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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 805

ARTHUR LEE RANEY, ET AL.,
PETITIONERS,

—v.—

THE BOARD OF EDUCATION OF THE
GOULD SCHOOL DISTRICT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 9, 1967
CERTIORARI GRANTED JANUARY 15, 1968

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In the

United States District Court

Eastern District of Arkansas

Pine Bluff Division

Civil Action No. PB-65-C-45

Arthur Lee Raney *et al.*,

Plaintiffs,

v.

The Board of Education of the Gould School District, a public body corporate, *et al.*,

Defendants.

Docket Entries

9– 7–65	Complaint filed. Summons issued.
9–11–65	Motion for preliminary injunction filed by plaintiffs.
9–25–65	Motion to quash service filed by defendants.
	Statement in support of motion to quash filed.
	Separate Answer of Harold Pearson filed.
	Statement in opposition to motion for preliminary injunction filed.
11– 6–65	Answer of the Board of Education of the Gould School Board filed.
11–24–65	Trial to the Court before Young, J. Motion to change defendant from Board of Education to Gould Special School District granted.

Docket Entries

	Motion by plaintiff to dismiss Harold Pearson, Chief of Police, as a party defendant, granted.
	Testimony completed at 3:00 p.m. and case taken under advisement.
11–29–65	Order by Young, J. dismissing Harold Pearson filed.
4–26–66	Memorandum Opinion by Young, J. filed.
	Order in accordance with opinion dismissing complaint filed.
5–26–66	Notice of Appeal filed by plaintiffs.

Complaint

(Filed September 7, 1965)

I

The jurisdiction of this court is invoked pursuant to the provisions of Title 28 U.S.C., Section 1342(3)(4). This is an action in equity, authorized by law, Title 42, U.S.C., Sections 1981 and 1983. The rights, privileges and immunities sought to be secured by this action are rights, privileges and immunities guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, as hereinafter more fully appears.

II

This is a proceeding for a preliminary and permanent injunction enjoining defendant Board of Education of the Gould School District, employees, its agents, successors, attorneys and all persons acting in concert with them from:

(1) requiring minor plaintiffs and all other similarly situated to attend the all Negro Field High School for the 1965-66 School term; and

(2) providing public school facilities for Negro pupils in Gould, Arkansas which are inferior to those provided for white pupils.

This is also a proceeding for a preliminary and permanent injunction enjoining defendant Harold Pearson, Chief of Police of the City of Gould, Arkansas and Deputy Sheriff of Lincoln County, Arkansas, and the members, employees, agents or attorneys of said Board from threatening or intimidating plaintiffs in the assertion of their rights secured to them by the Fourteenth Amendment to the United States Constitution.

III

Plaintiffs in this case are Negro citizens of the United States and the state of Arkansas who reside in the city of Gould, Lincoln County, Arkansas.

Minor plaintiffs are pupils in grades five, ten and eleven in the Gould school system who have been refused or denied admission to the predominantly white public schools by defendant school district.

Plaintiffs bring this action on their own behalf and on behalf of all others similarly situated pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure. There are common questions of law and fact involved which affect the rights of other Negro pupils who are so numerous as to make it impracticable to bring them all individually before this Court but a common relief is sought and the interests of the class are adequately represented by plaintiffs.

IV

Defendant Board of Education of the Gould, Arkansas School District is a public body corporate organized and operating under the laws of the state of Arkansas. T. Raymond Sage is the Superintendent of Schools of said school district.

Defendant Harold Pearson is the Chief of Police of the City of Gould, Arkansas and a deputy sheriff of Lincoln County, Arkansas.

V

Defendant Board of Education of the Gould School District operates the Gould Public Schools which includes: (a) The Gould high school and elementary school attended primarily by white pupils and staffed by all white teachers;

and (b) the Field High School and elementary school attended by Negro pupils and staffed by Negro teachers.

VI

Defendant Board of Education of the Gould School District permits a number of white pupils who live outside the district to attend white Gould Public School. Such pupils are "bussed" into the white Gould public schools.

VII

Prior to September, 1965, Defendant operated a completely segregated school system for white and Negro pupils. However, in order to comply with the guidelines of the Office of Education of the United States Department of Health, Education and Welfare promulgated pursuant to Title IV, Section 405 of Public Law 88-352 known as the Civil Rights Act of 1964, and to prevent the cutoff of federal funds to it. Defendant submitted a "freedom of choice" compliance plan to said Office of Education by which defendant agreed to desegregate all grades this fall. Said Office of Education approved the Gould desegregation plan.

VIII

During the summer prior to the opening of school in September, 1965, approximately 100 Negro pupils "chose" white schools in defendant Gould School District in all grades. However, on or about September 3, 1965, defendants' School Superintendent Sage advised plaintiffs and other persons similarly situated in grades five, ten and eleven by newspaper notice and some by letter as well that Negro pupils' preferences for the white Gould schools in

those grades would not be honored because of overcrowding.

Plaintiffs and others similarly situated were thus relegated to the all Negro Field School.

IX

The all-Negro Field High School is an old, wooden frame structure in ill-repair. It has no laboratory facilities and unsuitable toilet facilities located outside of the building. The library consists of two well worn sets of encyclopedias. It is rat infested with large cracks in the walls, floors and ceilings. Because of these conditions, the Field School is unaccredited by the Arkansas State Department of Education.

X

The predominantly white Gould High School and elementary school is a new brick structure which has adequate laboratory and science facilities, a workshop, an adequate library, indoor bathroom facilities, central heating and air conditioning and many other facilities which the Field School does not have. The Gould school is rated (A) by the Arkansas State Department of Education.

XI

On or about September 5, 1965 plaintiffs and other Negroes made plans to discuss the problems of school segregation and the inadequacy of facilities at the Field School with Superintendent Sage. Upon learning of plaintiffs' plans, the Chief of Police of Gould, Arkansas, Harold Pearson, who is also Deputy Sheriff of Lincoln County, Arkansas and a School Board member sought out and

threatened several of plaintiffs and/or several of those associated with them with bodily injury if they continued their protests against school segregation and the conditions at the Field School.

XII

Minor plaintiffs and members of their class have been denied and deprived by defendants of the rights secured to them by the Fourteenth Amendment to the United States Constitution solely because of their race or color. Plaintiffs have no plain, adequate or complete remedy at law to redress these wrongs and this suit for injunctive relief is the only means of securing adequate relief. Plaintiffs stand to suffer irreparable injury and damage from defendants unless defendants are enjoined by this court from continuing the practices herein complained about.

WHEREFORE, Plaintiffs respectfully pray that this court advance this cause on the docket, order a speedy hearing at the earliest practicable date, and upon such hearing, enter a preliminary and permanent injunction enjoining defendant Board of Education from:

(1) requiring minor plaintiffs and all other similarly situated to attend the all-Negro Field School for the 1965-66 School Term;

(2) providing public school facilities for Negro pupils in Gould, Arkansas which are inferior to those provided for white pupils;

(3) expending any funds for operation or improvement of the predominantly white Gould Public Schools until and unless the Field School is made substantially equal in

facilities, equipment, curriculum, advantages, opportunities, etc. to the predominantly white Gould schools; and

(4) otherwise operating a racially segregated school system.

Plaintiffs pray that this court enjoin defendants from intimidating, threatening or, in any way, interfering with the exercise of rights secured to plaintiffs and members of their class by the Constitution of the United States of America.

Plaintiffs further pray that this court allow them their costs herein, reasonable attorneys' fees, and such other additional or alternative relief as may appear to the court to be equitable and just.

Respectfully submitted,

/s/ JOHN W. WALKER

JOHN W. WALKER
1304-B Wright Ave.
Little Rock, Arkansas

Answer of the Board of Education of the Gould School District

(Filed November 6, 1965)

For its Answer to the Complaint of Plaintiffs, the Board of Education of the Gould School District, objecting to the Court's Order made at pre-trial conference on November 4, 1965 denying its Motion to Quash Service, and without waiving any of the jurisdictional questions raised by such Motion, states:

1.

That the jurisdictional allegations of paragraph I and II of the Complaint require no answer, but to the extent that they imply that Plaintiffs have been denied any constitutional rights by this Defendant they are denied.

2.

The allegations of paragraph III with reference to the residence of the Plaintiffs and their status with respect to the public schools are admitted. It is denied that Plaintiffs are members of a class so as to be authorized to prosecute this as a class action. It is denied that the class which they purport to represent is so numerous as to make it impracticable to bring them all individually before the Court. It is denied that such purported class is adequately represented by Plaintiffs.

3.

It is admitted that Defendant Harold Pearson is the Chief of Police of the City of Gould and a Deputy Sheriff of Lincoln County, Arkansas, and that T. Raymond Sage is Superintendent of Schools of Gould Special School District

of Lincoln County. It is denied that the Board of Education of Gould, Arkansas, School District is a public body corporate organized and operating under the laws of the State of Arkansas.

4.

The allegations of paragraphs V and VI are admitted.

5.

The allegations of paragraph VII are admitted except that it is denied that the sole purpose of formulating a desegregation plan was for the purpose of qualifying for federal funds. It is also denied that the Office of Education approved the desegregation plan as initially submitted.

6.

The allegations of paragraph VIII are admitted.

7.

It is admitted that the Field High School is an old wooden frame structure. All other allegations of paragraph IX are denied.

8.

It is admitted that the Gould High School and Elementary School are located in brick or block buildings, have indoor bathroom facilities, and that the High School has a Class A rating with the State Department of Education. All other allegations of paragraph X are denied.

9.

The allegations of paragraphs XI and XII are denied, and it is specifically and separately denied that Plaintiffs will suffer any irreparable injury or damage unless this Defendant is enjoined by this Court.

WHEREFORE, this Defendant renews its Motion To Quash Service for the reasons set forth therein, and without waiving said Motion in the alternative prays that the Court dismiss the Complaint, and that this Defendant have judgment for its costs herein expended, and for such other or different relief as may appear to the Court to be equitable and just.

SMITH, WILLIAMS, FRIDAY & BOWEN

By /s/ ROBERT V. LIGHT

By /s/ ROBERT V. LIGHT
1100 Boyle Building
Little Rock, Arkansas
Attorneys for the Board of Education of the Gould School District

Memorandum Opinion of Gordon E. Young, *D.J.*

(Filed April 26, 1966)

The plaintiffs in this case are Negro children who are pupils in grades five, ten and eleven in the Public School System of Gould, Arkansas. This action was brought by their parents and next friends and is a class action seeking an injunction enjoining the Board of Education of the Gould School District from (1) requiring the minor plaintiffs and all others similarly situated to attend the all-Negro Field School for the 1965-66 school term, (2) providing public school facilities for Negro pupils in Gould, Arkansas, which are inferior to those provided for white pupils, (3) expending any funds for operation or improvement of the predominantly white Gould Public Schools until and unless the Field School is made substantially equal in facilities, equipment, curriculum, advantages, etc. to the predominantly white Gould Schools, (4) building any new facilities to replace Field High School at any location other than on or adjacent to the grounds of the Gould Public Schools, and from (5) otherwise operating a racially segregated school system.

The defendant school board claims that it is doing everything possible to correct the very things plaintiffs are complaining of and that no injunction is required or warranted, therefore the case should be dismissed.

The Gould School District encompasses about eighty square miles of argricultural land in Lincoln County in Southeast Arkansas. Almost 20,000 acres of this land is tax exempt because the Arkansas State Penitentiary is located within the district. It is a rural and agricultural area. There are no significant industries within the district, and Gould, with a population of 1,210, is the district's only incorporated town. In the 1964-65 school year the

district derived $56,530 from its millage levy on the assessed value of the real and personal property in the district and most of the rest of its budget of over $200,000 was received from various programs of the State and Federal Government. It is obvious from these facts and from other testimony given at the hearing of this case that this school district is a financially poor one.

The population of the district of about 3,000 consists of 1,800 Negroes and 1,200 white people. There are approximately 880 students in the system and 580 of these are Negro. Prior to 1965 the school board operated two school systems from grade one through twelve on a racially segregated basis. The Field Elementary School and the Field High School were attended by Negro children only. Th Gould Elementary School and the Gould High School had only white students. In the spring of 1965 the defendant school board unanimously voted to accept a desegregation plan which provided for the integration of all twelve grades of the system in the 1965-66 school year in accordance with a "Freedom of Choice" plan.[1]

After the students and their parents had expressed their choice of schools it appeared that there would be overcrowding in the Gould Schools in grades five, ten, and eleven. The school authorities discussed the problem with the appropriate authorities of the Department of Health, Education and Welfare and it was agreed that it would be better for the school to postpone the granting of the freedom of choice in these grades for one year. However, as many Negro children in these three grades as possible who

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NOTE 1: The "Freedom of Choice" plan in this case is of the same type that the Court of Appeals for the Eighth Circuit indicated it would approve in Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965), therefore it is unnecessary to explain the details of the plan in this opinion.

chose the previously all-white school were accepted in that school on the basis of geographic proximity of their home to the school. The plan as amended was approved by the federal agency.

In other words, all students in the district were accepted in the school of their choice except in the fifth, tenth, and eleventh grades. In these grades some forty Negro pupils expressed a preference to attend the Gould Schools and twelve of them were accepted. The remaining students were assigned to the Field Schools and it is this group that is represented by the plaintiffs in this case.

At the trial plaintiffs offered testimony concerning alleged discrimination within the district which they contend this Court should correct by use of its injunctive powers.

One of plaintiffs' contentions is that the Court should enjoin the defendant school board from maintaining a racially segregated school system. But the testimony discloses that the school board is no longer maintaining such a system. The desegregation plan which it has adopted and which has been approved by the Department of Health, Education and Welfare has brought about more than token integration even though it has been in operation only one year. There are 71 Negro students and 298 white students attending the previously all-white school and there will undoubtedly be more Negro students in this school next year. The Negro students are participating on the school athletic teams and taking part in several other extra-curricular activities at the school. Furthermore, in the school term beginning September 1966 it is the plan of the district to honor the preference of all children in the three grades to which the Choice plan was only partially applicable this year.

Another contention of the plaintiffs is that the school board is discriminating against Negroes by paying Negro teachers salaries lower than those paid to white teachers. The testimony revealed that the base salary paid to Negro teachers is $3,870, while the base salary for white teachers is $4,050.00. The range of salaries for Negro teachers is from $3,870.00 to $4,500.00, and the range for white teachers is $4,050.00 to $5,580.00. The superintendent of the schools testified that he was well aware of the differences in salaries paid to the teachers of different races, and he said that the historical reason for this difference was simply the law of supply and demand. Because of the larger supply of Negro teachers he was able to hire them at lower salaries than those demanded by white teachers. He stated that five years ago, when he was first employed by the school system, the difference in the base salaries was $600. In the last five years the difference has been lowered to $180. The reason the salaries cannot be equalized before next year is purely a financial one. The budget for the 1965-66 school year is practically exhausted and there are no funds available for this or any other purpose.[2] In the course of his testimony, the superintendent assured the Court that the salaries for Negro and white teachers for the 1966-67 school year would be equal.

The primary complaint of the plaintiffs is that they are being discriminated against because the Field Schools to which they have been assigned are grossly inferior to the Gould Public Schools. They show the inferiority of the Fields Schools by citing several examples. Some of these

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Note 2: The total received for all school purposes this year was $225,000. The budget expenditure is $221,000. This is a typical year. The surplus remaining from last year was $1,200.

are: (1) the Field High School is a frame building erected in 1924 which is in a poor state of repair, with holes in the floor and cracks in the wall, while the Gould High School is located in a brick and concrete block building only two years old; (2) the Gould High School has an "A" rating from the Arkansas Department of Education, while the Field High School is unaccredited; (3) the restroom facilities at the Field High School are located in a separate building, causing students to walk outdoors to reach the restroom, while at the Gould High School the restroom facilities are located in the school building itself; (4) the Field High School is heated with upright gas heaters, while the Gould Schools are heated with central heat; (5) the science laboratory facilities at Field High School are inferior to those at Gould High School; (6) the library facilities at Field High are very poor, with few books and no full-time librarian, while the Gould School library contains almost 1,000 books and has a librarian; (7) there is no hot lunch program at the Field Schools, while the Gould Schools have an air-conditioned cafetorium; and, finally (8) courses in journalism and agriculture are not offered at the Field High School, while they are taught at the Gould High School.

The defendant admits that facilities at the Field High School are inferior to those at the Gould Schools, that the situation is a bad one, and that a new school building is needed. It claims that there are no funds available at the present time with which to build such a school and that the school district does not have sufficient borrowing power to secure enough money for such a project. To borrow that much money the school district would need a new bond issue, but since the present millage is at 47 (the maximum

allowable under State law),[3] new millage cannot be added to finance such a bond issue. However, one of the present outstanding bond issues will be paid off by January of 1967, and the nine mills used to finance that issue can be transferred to a new issue. The money obtained through this new bond issue has long been earmarked by the board for the construction of a modern facility to replace Field High School. Therefore, it appears that the defendant school board realizes the need for a new school building and is doing all that it is financially able to do toward filling this need.

On the other hand, the defendant does not admit the degree of inequality between the schools is as great as plaintiffs claim. They contend that although the Field High School building is in very poor condition and is inferior to the Gould High School building, the same is not true for the rest of the buildings in the Field School System. The evidence shows that in the last fifteen years, or at least since 1954, over seventy-five per cent of all money available for construction has been spent on the Negro schools. In fact, the total building expenditures for the Negro schools since 1954 are in excess of $138,000. On the other hand, the only money spent on capital improvements at the Gould School was from proceeds of an insurance policy when the school building burned late in 1963. The new building was built entirely with the funds from this insurance policy.[4] The Field Elementary School is a mod-

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Note 3: Under Arkansas law a school district may not issue bonds in an amount in excess of 15% of the district's assessed valuation of property located within the district. Gould has reached that limit.

Note 4: A Teacherage, consisting of two cottages for occupancy by teachers, was constructed on the Field campus a year or two ago. This was financed locally, and the monthly payments to pay the loan come from rent paid by the teachers.

ern brick and concrete block building built in 1954 with classrooms added as late as 1965. The gymnasium for the Field Elementary and High Schools is a modern concrete block building with excellent restroom, dressing room, and shower facilities, as well as a fine gymnasium and auditorium. The gymnasium at the Gould School is an old frame building in poor repair, with inadequate and unsightly dressing room and restroom facilities. The home economics buildings at both the schools are old buildings which the citizens of the school district have helped repair and decorate, and which are of approximately the same quality. Although it was never definitely established just what scientific laboratory facilities the Field High School has, it is evident from the testimony that they are inadequate and practically nonexistent. However, the laboratory facilities at the Gould High School would hardly be considered adequate or satisfactory. The laboratory is located in an old concrete block building that was once used as a barbeque house. For most of the experiments there is only enough equipment for the teacher to use at a demonstration desk and sink. According to the evidence, no building on either campus is heated by central heat, and in the last two years the same amount of money has been allocated to each of the libraries. The defendant admits that the Field Schools do not have a hot lunch program or an agriculture department but claims that federal aid is being sought, and the superintendent of schools assured the Court that both programs would be established in the Field Schools by the end of this year. Defendant also states that the reason some courses such as journalism are taught in Gould School and not in Field School is that they are elective courses and are not taught unless there is a sufficient demand for them. Therefore the defendant

claims that although conditions at the Field High School are poor, there is not a large degree of inequality between the two school systems.

During the course of the hearing on this matter, after the defendant had admitted the inferiority of the Field High School and had set forth its proposal for building a new facility, plaintiffs moved in open court to amend their petition for an injunction to include enjoining the defendant from building any new facilities to replace Field High School at any location other than on or adjacent to the grounds of the Gould Public Schools. This, it is believed, is the only real issue remaining in the case. The Court granted the motion, and evidence was heard on both sides of this question. The Court also asked counsel for briefs on the question of whether or not the Court could or should order the school district to build its proposed new facilities at any particular location.

It is plaintiffs' contention that the building of a new high school at the site of the old Field High School or on the Field Elementary School grounds would promote and encourage segregation in the school system. Plaintiffs contend that if the new high school was built at one of these locations, only Negro pupils would request that they be assigned there. Plaintiffs also say that in fact this is the intention of the school board. They point out that at the hearing the superintendent of schools stated that probably only Negro children would select the new high school and plaintiff argues that this shows that it is the school board's intention to create a "Negro high school" and not just another high school for the district. Plaintiffs argue that it is a breach of plaintiffs' constitutional rights to allow defendant school board to carry

out a construction program which is designed to bring about or further segregation in the school system.

Plaintiffs also contend that it would be unsound for a school district in the financial condition of the Gould School District to maintain separate school facilities for Negro children. Such a plan would entail considerable duplication and would dilute the quality of education which could be offered to both white and Negro students by a school district of this size.

The defendant contends that the management or administration of the schools has been committed to local school officials and is not within the province of the Court and that selection of the location of a new school facility is an administrative or managerial decision which should be left to those officials whose duty is to determine what is best educationally and administratively for the school system. The defendant claims that there are several reasons why it is unsound to locate the new high school at the site insisted upon by plaintiffs and which support the board's selection of a site adjacent to the Field Elementary School. These facts are (1) that the school district already owns enough land at the Field Elementary School to accommodate the new high school building, (2) the district does not own sufficient land at the site of the Gould High School for this purpose, (3) additional land near the Gould High School is not for sale and would have to be acquired by condemnation at a high price since it is being subdivided into residential lots, (4) the new gymnasium (which has been referred to above) was built on the grounds of the Field Elementary School to accommodate both elementary and high school students in anticipation of the location of the new high school on that campus, (5) that the location of the schools in opposite

ends of town and on opposite sides of a heavily traveled U. S. highway is desirable for the safety of the children and for obtaining the educationally advantageous concept of "neighborhood schools."

The question before the Court is actually two pronged. First, is this Court authorized to tell the school board where to build or not to build a new school building, and second, should the Court do so under the circumstances in this case? These questions are of first instance before this Court, and in fact there is very little authority from any jurisdiction.

In the "landmark" civil rights cases concerning school integration the courts leave no doubt that segregation is and must be a thing of the past. They tell the courts that there can no longer be "Negro schools" and "White schools" and that the courts cannot permit a state to support "segregated schools through any arrangement, management, funds or property. . . ." *Cooper* v. *Aaron*, 358 U.S. 1. In a general way these cases give this and all district courts the authority to take what steps are necessary to insure that there is an end to segregation in our schools.

At the same time these cases also contain language which seems to recognize a limit to the courts' authorization to deal in school affairs. In *Brown* v. *Board of Education of Topeka*, 349 U.S. 294, the court said:

> "school authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."

In *Briggs* v. *Elliot,* 132 F.Supp. 776, 777 (E.D. S.Car. 1955), a three-judge district court interpreting *Brown* said,

> "Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the state."

And this Court in *Aaron* v. *Cooper,* 164 F.Supp. 325, 334 (1959) stated:

> "It is not the duty or function of the Federal Court to regulate or take over and operate the public schools. That is still the duty of the duly state-created school authorities."

These cases make it apparent that there is a limit to the court's authority to deal in school matters, although they do not say what that limit is.

In *Board of Public Instruction of Duval County, Fla.* v. *Braxton,* 326 F.2d 616 (1964), the Court of Appeals for the Fifth Circuit approved an injunction issued by Judge Simpson of the District Court for the Middle District of Florida in which the school authorities were enjoined from operating a compulsory biracial school system, maintaining dual attendance areas, assigning pupils and teachers on the basis of color, and from

> "Approving budgets, making available funds, approving employment contracts and construction programs, and approving policies, curricula and programs designed to perpetuate, maintain or support a school system operated on a racially segregated basis."

Although that injunction does not go as far as plaintiffs have asked for in this case, it does go further into the realm of school administration than any other court has gone. Perhaps some of the factors that the case dealt with should be pointed out in that they may limit the scope of the decision.

In that case the court was dealing with a school system that, some eight years after the second *Brown* decision, had done nothing toward bringing an end to segregation. In fact, the board was still maintaining and planning to continue to maintain separate systems for colored and white children with dual attendance areas. The court, of course, was trying to enjoin *all* this type action. Therefore it did enjoin all the policies of the board including its future construction policies which were "designed to perpetuate, maintain or support a school system operated on a racially segregated basis."

In June of 1965 this Court in *Yarbrough* v. *Hulbert-West Memphis School Dist. No. 4*, 243 F. Supp. 65, 71, said:

> ". . . the basic responsibility and authority for operating the schools in a constitutional manner rest upon school boards and school authorities rather than the courts. The question is not what the court would do if it were operating the schools, but whether the defendants are proceeding in a permissible manner from a constitutional standpoint."

This still seems to be the better or most well reasoned role for the court. It should be an ameliorative or corrective body rather than an initiating or policy-making one. Once the school board has made a decision to take a certain action in the administration of the schools, then it be-

comes the Court's duty to determine whether or not this action is constitutional.

However, this Court is not prepared to state that there might not be circumstances under which the Court would be justified in taking action such as that the plaintiff is asking for in this case. Assuming without deciding that this is an area of school policy-making which the court could enter to protect the civil rights of the school district's citizens, this Court does not feel that the circumstances of this case merit such action.

Here the school board has begun a desegregation program for all twelve grades without having been ordered to do so by a court. The delay in the program for the three grades involved in this case is temporary and future plans call for complete integration. The fact that the Negro children who are attending the previously all-white schools are participating in the school's curricular and extra-curricular activities seems to indicate that this plan is more than a pretense or sham to meet the minimum requirements of the law.

The availability of campus area in one place and not the other, the lack of funds to procure more land, and the necessity of locating the new high school near the existing gymnasium designed to accommodate the high school students are all valid reasons for the administration's decision as to the location of the new high school. There is no reason to assume that only Negro students will attend the new high school. In fact, it is a virtual certainty with the progress of integration, building space limitations alone will insure that the new school will be integrated. Certainly these reasons, coupled with the school board's recent initiative toward integrating the schools, do not indicate that the board's plans are solely motivated by a

desire to perpetuate or maintain or support segregation in the school system. Therefore, the Court will not usurp the normal managerial prerogative of the school board to the extent of determining where the new building will be located.

CONCLUSION

Practically all of the questions or problems in this case stem from one major source—the school district has a serious lack of funds. The main problem, of course, is the inferiority of the Field High School. However, if the Court ordered the school board to build a new facility tomorrow the board would be powerless to act. It simply does not have the money to do so. It is obviously not the purpose of an injunction to order someone to do something he is already doing or something which is impossible for him to perform. Therefore, this Court can see no reason for the requested injunction to be issued. The petition will be denied and the case dismissed.

Dated: April 26, 1966.

GORDON E. YOUNG
United States District Judge

Order of Dismissal

(Filed April 26, 1966)

In accordance with memorandum opinion filed this date, the complaint is dismissed.

Dated: April 26, 1966.

/s/ GORDON E. YOUNG
United States District Judge

—1—

Transcript of Hearing of November 24, 1965

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BE IT REMEMBERED, that a hearing was had in the above-entitled and numbered cause, on its merits, before The Honorable Gordon E. Young, Judge of said Court, in the Federal Court Room, Federal Building, in the city of Little Rock, State of Arkansas, on November 24, 1965, beginning at the hour of nine-thirty A.M.

There were present at said time and place, the following appearances:

For the Plaintiffs: Mr. John W. Walker, of Little Rock, Arkansas.

For the Defendants: Mr. Robert V. Light, of the firm of Smith Williams Friday & Bowen, of Little Rock, Arkansas.

—3—

PROCEEDINGS

WHEREUPON, the following proceedings were had in open court in the presence of the Court and counsel for the respective parties:

The Court: Gentlemen, the case for trial is Arthur E. Raney, et al., Plaintiffs, vs. The Gould School District Board of Education. Are the plaintiffs ready Mr. Walker?

Mr. Walker: The plaintiffs are ready, Your Honor.

The Court: Are the defendants ready Mr. Light?

Mr. Light: Your Honor, still reserving the position we took on the Motion to Quash, we are ready to proceed.

The Court: Oh, that's addressed to the fact that the Board of Education was named as the defendant instead of the members of the School Board?

Mr. Light: Essentially, yes, Your Honor. It's two-fold, one is that the Board of Education is not a body-corporate,

subject to suit, the other is that no proper service has been had so as to bind the District or the Board.

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The Court: Who was service had on?

Mr. Light: On a member of the Board, Your Honor.

The Court: How many members of the Board are there, six?

Mr. Light: Five.

The Court: How many of them are here this morning?

Mr. Light: All of them.

The Court: All five of them are here. Well that Motion will be—I don't know whether I denied it formally or not, but it will be denied.

Mr. Light: I have answered reciting that the Court overruled it at our pretrial conference.

The Court: All right. Thank you. Now, Mr. Walker, we have more than one defendant here. I believe we had some discussion about that at our conference. Do you recall?

Mr. Walker: Yes, sir.

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The Court: Do you have a Motion to make in that regard?

Mr. Walker: Yes, sir. I would like to preface it with the statement to the effect that under Arkansas law, the Gould School District is a body corporate and, as such, may sue and be sued. I would at this time like to move to amend our complaint and to have the corporate name of the defendant changed in the complaint to the "Gould Special School District of Lincoln County". I think we had it listed as the "Board of Education of the Gould School District". This is a technicality.

The Court: That will be granted.

Mr. Walker: We would like to have at this time the defendant Harold Pierson, who is Chief of Police of the City of Gould, and also a Deputy Sheriff of Lincoln County, Arkansas, dismissed as a party-defendant.

The Court: I'm sure there's no objection to that Mr. Light?

Mr. Light: Not to that one.

The Court: The motion will be granted and the complaint is dismissed insofar as it relates to Harold Pierson, Chief of Police of the City of Gould and Deputy Sheriff.

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Now, so that I don't forget it, at your convenience, Mr. Light, would you mail me a short order so it will be on file dismissing the complaint as to him?

Mr. Light: Yes, sir.

The Court: It's better to do it that way than simply to have it in this record which may or may not ever be written up.

Mr. Walker: That's right. I would like to call at this time Mr. T. Raymond Sage, Superintendent of Schools of the Gould School District.

WHEREUPON, T. RAYMOND SAGE, called as a witness on behalf of the plaintiffs being first duly sworn, testified as follows:

Direct Examination by Mr. Walker:

Q. Would you state your name please? A. T. Raymond Sage.

Q. What is your occupation, Mr. Sage? A. Superintendent of Schools, Gould School District.

Q. How long have you been superintendent of Schools there in Gould? A. This is the fifth year.

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Q. Would you tell us what your educational preparation is, Mr. Sage? A. Bachelor's Degree from Hendrix College, Master's Degree from the University of Arkansas.

Q. Now, I would like to have you tell the court—give the court some statistics about the Gould School District. What is the enrollment of Gould School District? A. Enrollment or enumeration?

The Court: I think he wants to know how many are in the school.

Mr. Walker: That's right, Your Honor.

The Court: Approximately. I know that varies a little bit.

A. That varies. I would say eight hundred and fifty.

Q. How many of these are Negro? A. A little over five hundred—about five hundred and fifty.

Q. About how many of the five hundred and fifty are in the elementary school—in the Negro Elementary School? A. I would say three hundred. I don't have the figures with me.

Q. Just an estimate will be fine, sir. And about how many of the remaining Negro pupils are in the Negro High School? A. I don't have those figures at all, between two Hundred and two fifty.

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Q. Thanks. How many Negro pupils attend the predominantly white schools in Gould? A. Approximately seventy.

Q. Is that included in the total of five hundred and fifty? A. Yes.

The Court: How many was that—seventy?

Mr. Walker: Seventy.

A. (Continuing) Wait just a minute. We have a little over five hundred in the Field School and approximately seventy negroes in the Gould Schools which would make a total of nearly six hundred.

Q. About six hundred out of eight hundred and fifty?

The Court: It really come out to 570 on the figures he has given you.

Q. All right, then. A. That's close to it.

Q. Now how many pupils who are included in that 850 total reside in the Wells Bayou School District?

The Court: Now that is another school district separate from the Gould School District.

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Mr. Walker: That is right, Your Honor.

The Court: What's the name of it?

Mr. Walker: Wells Bayou.

A. I believe our latest figures show about fifty-five or sixty percent, sir.

Q. How many of those are Negro? A. We have fifty-four from Wells Bayou District attending the Fields School, we have six attending the Gould School which would make a total of sixty.

Q. All right.

The Court: You mean sixty of sixty-five are Negroes?

Mr. Walker: Sixty of sixty-five or so are Negro. Is that right, sir?

A. That's right.

Q. Now, is it true Mr. Sage that up until September of 1965 the Gould School District operated separate schools for Negro and for white pupils? A. That's correct.

Q. Is it true that up until that time all negro puplis were required by the District to attend either the Field High School or the Field Elementary School? A. That's right.

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Q. Is it true that up until that time that the Staff of the Fields Schools—both schools—was all Negro? A. Right.

Q. As of September 1965 what was the rating or the accreditation of the Fields High School? A. The Fields High School did not have a rating, in other words, it was unaccredited. The Fields Elementary School was Class "C".

The Court: Fields Elementary School, Class C?
The Witness: That's right.

Q. Now, would you describe to the court the physical condition of the Fields High School, the main building, first of all of the Fields High School? A. The main building of Fields High School is a frame building consisting of class-rooms, principal's office and adjoining it is the Home Economics Department.

Q. The Home Economics Department, and what else? A. The Home Economics and class-rooms, itself.

Q. Is there another building in that area, Mr. Sage? A. Yes.

Q. What is that building? A. That building, up until this year, had been used for some elementary grades, the

—11—

fifth and sixth grades, but during the summer we built

two additional class rooms at Fields Elementary School, so that those grades could be transferred.

Q. All right. Now, I'm saying that on the same spot of land where the Fields High School is located, in addition to the Home Economics Building and the main building, is there another structure? A. This structure that had been used for the fifth and sixth grades.

Q. What is that being used for now? A. That is not being used.

Q. Isn't there a bath, isn't there a separate bath-house or bath-room? A. Yes, I didn't think about those. The rest-room facilities are in separate buildings.

Q. All right. Would you tell the court, first of all who uses the gymnasium of the Fields High School? A. Well I presume that all high school students use it. All students, elementary students used it too.

Q. How far is the gymnasium for the Negroes in Gould, away from the high school facilities? A. I would say about four blocks.

Q. About four blocks away, so then that, it is on the premises of the elementary school? A. That's right.

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Q. What grade pupils attend Fields High School? A. Seventh through twelfth.

Q. At this point I would like for you to state the salary of the principal of the Fields High School? A. The salary of the principal of Fields High School is $5100.

Q. What are his responsibilities? A. He is responsible for maintaining discipline, overseeing the work of the teachers, he just runs that Fields Elementary and Fields High School.

Q. What is his educational qualifications? A. He has a

Bachelor's Degree—I don't recall what school it is from and some work towards his Master's Degree.

Q. I see. In your opinion, is he academically qualified to be a high-school principal? A. He is academically qualified for a Class "C" or a Class "B" rating. A Class "A" rating requires a Master's Degree.

Q. Would he be qualified to be principal of the Gould High School? A. No.

Q. What are the qualifications of the Negro School teachers generally, in Gould? A. Every teacher has a Bachelor's Degree and at least two teachers have Master's Degrees out of seven, the others have Bachelor's Degrees.

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Q. Are these generally as well prepared or as well qualified as the white school teachers? A. Technically on paper they are. Whether they are as well qualified actually to teach classes, I wouldn't be prepared to say. I did not observe them teaching.

Q. You have not observed them teaching? A. Maybe in a few instances, yes, but not every teacher.

Q. All right. Would you say that they are qualified to teach in a predominantly white school of Gould? A. As far as I know.

Q. Do you have any plans to have any of them teach in the predominantly white school at Gould? A. We haven't made any plans to that effect. In fact, we haven't given much thought to the faculty integration because we wanted to get the matter of pupil integration settled before we started that.

Q. Are the Negro teachers paid according to a different salary scale than the white teachers? A. Some difference.

Q. Pardon? A. Yes.

Q. What is the average salary of the Negro teachers in the School District?

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The Court: Now, let's see, are we talking from the twelfth grade down to the first—I mean the average?

Mr. Walker: I think the figures will show, which I have, will show that all teachers are paid just about the same—elementary and high schools—were paid just about the same. Go ahead.

A. The class-room teachers at Fields School I believe the salary this year was $3,870.00 without any extra duties.

Q. $3,870. And what did you pay the white teachers?

A. The base salary for white teachers was $4,050.

Q. $4,050.

The Court: We talked about "averages" a moment ago.

Mr. Walker: That's the base, Your Honor.

The Court: Are they comparable?

Mr. Walker: No, they're not, Your Honor. We will get to that.

Q. (resuming) I show you here data concerning the Gould School district and show you the salary schedules you have for both schools for this year, and ask you to identify it. A. (Witness examines the data) I believe that's correct.

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Q. Now—

The Court: That base salary of "white" with Bachelor's Degree was what?

The Witness: $4,050.00.
The Court: All right.

Q. (Resuming) Now, I ask you is it not true that the range of Negro teacher's salaries is from $3,870.00 to $4,500.00? A. That's right.
Q. And for white teachers the range is from $4,050.00 to $5,580.00? A. That's right.

The Court: Are we talking about class-room teachers?
Mr. Walker: Yes, sir.

Q. (Resuming) Are you aware— A. May I ask if that range for white teachers includes extra duties that they have, such as a Principal of a school being a Coach?

The Court: Does it include a Principal?

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The Witness: We have a man who serves as Principal, who acts as Principal, and is paid a principal fee. It does not carry the title of "Principal" as far as the State Department of Education is concerned because of the fact that he has not a Master's Degree, so we didn't list him as the head teacher.
The Court: Do you have a Coach?
The Witness: We have two Coaches.
Mr. Walker: Well, let's not—
The Court: Let met get this down to strictly "comparable"—the $4500.00 top of the "colored" was classroom teachers?
Mr. Walker: The $4500.00 top was a person who was both a classroom teacher and a coach.

The Court: I see. All right.

Mr. Walker: (Continuing) The top for a classroom teacher with a Master's Degree is $4400.00. That's a person who has a BS degree and is teaching Home Economics. The top salary for a non-administrative person in the white schools is $5400.00, that

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person being a Mr. Billy Ray McGehee, who is the Agriculture teacher.

A. That's right.

Q. (Mr. Walker, resuming examination) Are you aware Mr. Sage, of a lawsuit that was brought against the District in 1949, seeking to have the School District equalize Teachers' salaries? A. I am not aware of it—

Q. Are you aware that the law has long required that salaries for both Negro and white teachers be equal? A. No, I am not.

Q. How do you justify paying white teachers more than you pay the Negro teachers? A. It's simply getting back to that old theory of "supply and demand". We could not get white teachers for the salary that we are paying the Negro teachers—no applications. For the Negro teachers, in the Field School, every year I am swamped with applications. I would get twice as many teachers at that salary if I need them.

Q. I see. But you could not get that number of white teachers? A. I could not.

Q. All right. Do you have any other basis for justifying it? A. That's the only basis.

Q. But you have admitted that you do have two sets of

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salary schedules for Negroes and white— A. I admitted that we pay white teachers some more for the same duties, but realize this, that difference is not nearly so much as it has been in the past. You will notice there's a difference of, I believe it's $180.00 as base salary there—$3870.00 and $4,050.00—which we are paying some of our classroom teachers, $180.00. When I came to Gould the difference was about $600.00. This year—well, last year, '64-'65, that difference had been cut to approximately $500.00, and this year with our increased money from the State Department, under the foundation plan, which was supposed to provide an increase of an average of $500.00 per teacher throughout the State. The Negro teachers received increases amounting to over $500.00 in each case. The white teachers' increase was $270.00, and next year when we will be in the second year of our increased funds from the State Department, the Negro teachers will be raised more like they were this year, so that, in 1966 the salary scale will be equal. We felt it was too much to try to overcome in one year and we are doing it in two steps.

Q. How do you justify paying a person who has been teaching whose got a Bachelor's Degree, who has been teaching in the Negro schools for thirty-five years, a salary of $3870.00, which is the minimum, while at the

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same time you pay a white teacher coming into the System for the first time, with no teaching experience, $4,050.00? A. As I said before, at that salary of $3870.00, it's the question of taking my pick of applications from Negro teachers for that school.

Q. All right. How can you justify— A. (Continuing) At that salary at the white school, I couldn't get one.

Q. All right. Now, what is the number of pupils that the head teacher at the white school has to supervise? A. He supervises the whole school, which is about 365, I would say.

Q. All right. And what is the number of pupils that the Negro principal has to supervise? A. He has approximately five hundred, maybe a few more, but there is this difference—

Q. Let me ask this question—

The Court: Let him finish.

A. Let me tell you this difference, the head teacher acting as Principal at the white school teaches four solid academic classes—Algebra I, Algebra II, Advanced Math, Plane Geometry, in addition to their supervisory duties. The Principal at the Fields School, has no teaching duties.

Q. How do you justify, however, paying that white teacher—

The Court: What white teacher?

Mr. Walker: The Principal, the head teacher.

Q. (Continuing) —$5,580.00, and the Negro person who is Principal of the Field High School only $5,100.00? A. Well, for two reasons. One is, as I just said, he has many more duties. He teaches in four academic classes in addition to his supervisory duties, and the other is the old theory of supply and demand.

Q. Aren't Principals generally the highest paid persons in the School System? A. That's right.

Q. But in this case the one Negro Principal that you have in the School System receives less than at least one teacher administrator?

The Court: I didn't follow you.

Mr. Walker: In this case, the one Principal in the School System, since there's only one full-time Principal in the School System, receives less money than at least one—and for the record let it be shown that there are at least two people in the white school who make more than the Negro Principal.

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The Court: You say there is only one Principal?

Mr. Walker: That's right. This person who serves as a Principal really isn't a Principal according to Mr. Sage. He is principally a teacher who has some administrative responsibilities.

The Court: I didn't think he said he really wasn't a Principal. Did you say that?

The Witness: No, I said— The one at the Gould School.

Mr. Walker: Yes.

The Witness: He has all the Principal's duties. The only thing we can not refer to him as a Principal on the Report to the State Department of Education. We can not call him a High School Principal because of the Degree.

The Court: Because he hasn't had that Master's Degree.

The Witness: Because he hasn't that Master's Degree.

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Mr. Light: Mr. Walker, for the record, is reading from—

The Court: Well, he is just using that to read his notes, Mr. Light. There's nothing wrong with that. Is that a copy of some official document? If either one of you want to introduce it, you can, but I won't require Mr. Walker to.

Mr. Light: Calling the Court's attention to the fact that Mr. Walker stated for the record that two white teachers are paid more than—

The Court: Well, that statement, as such, will be stricken from the record.

Mr. Walker: All right.

Q. (Mr. Walker, resuming) Mr. Sage, I ask you whether or not Billy Ray McGehee and Charles D. Cheatam and Harry M. Nash are paid salaries which exceed that of Horace I. Dalton, the Negro High School Principal? A. That's correct.

Q. Is there a hot lunch program at the Field School? A. Not at the present.

Q. Have you ever had lunch there? A. Not as fat as I know.

Q. Now is there a hot lunch program at the predomi-

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nantly Gould white High School? A. Yes.

Q. The elementary school pupils can take advantage of that too? A. Yes.

Q. Mr. Sage, is there an Agriculture Building at the white school? A. There is.

Q. Is there such a building at the Negro School? A. Not at the present.

Q. Is there—

The Court: A building?
Mr. Walker: A building.
The Court: A Department.
The Witness: We don't have an Agriculture Department at the Negro School.

Q. (Mr. Walker, resuming) Now, in the Negro School, is there an auditorium? A. There is a combination auditorium and gymnasium.

Q. I'm saying, at the Negro High School, is there an auditorium? A. Yes, there is a place in the central part of the building that can be used for small assemblies.

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Q. About how many people would that hold? A. I don't know. Perhaps the Principal of the school could tell you more about that.

Q. Would two hundred seem like a high figure? A. I would think so.

Q. Now, is there an auditorium at the white high school? A. There is a combination lunch-room and auditorium.

Q. Is there a library at the Negro high school? A. There is a space for a library.

Q. Is there a library at the Negro high school? A. I would say there is a library, yes.

Q. I show you a picture here Mr. Sage, that was taken yesterday, and ask you to identify this picture.

The Court: Are we talking about "Field"?
Mr. Walker: Yes, Your Honor.

Q. Do you recognize that, Mr. Sage? A. Yes.

Q. Isn't that a picture which shows the major part of

the library at the Field High School? A. I don't know if it shows the major part of it because I don't know what books are out, whether—

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Mr. Walker: I would like to have this introduced as Plaintiffs' Exhibit I. It has been marked and I would like to refer to it later.

The Court: It may be received.

(Whereupon, Plaintiffs' Exhibit I, previously marked for identification, is received in evidence and made a part of this record.)

Q. (Mr. Walker, resuming) Now, is there a library at the predominantly white high school? A. Yes, there is.

Q. Do you have a person who superintends that library? A. Yes.

Q. Do you have a person who superintends the library at the Negro high school? A. One of the teachers acts as librarian.

Q. One of the teachers—which one? A. I believe it's the Social Studies Teacher.

Q. Is she paid a special salary for that? A. No.

Q. Is the white teacher paid a special salary for superintending the library? A. The teacher at Gould High School has two periods set aside for the library.

Q. I see. Did you know the approximate number of books that are in the library of the Field High School?

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A. No, I do not.

Q. Would you know the approximate number of books in the white high school? A. I do not know. I would presume somewhere in the neighborhood of a thousand books.

Q. I see. Is there a study-hall in the Negro high school? A. There is a room, we refer to it as an assembly room that I believe is used as a study-hall.—

Q. You believe it is. Is there a study-hall at the white high school? A. (Continuing) I know they have study-hall periods and I assume they have it there.

Q. You don't know though whether they do. A. No.

Q. How long have you been Superintendent of the School District? A. Five years—this is the fifth year.

Q. Now, is there a study-hall at the white high school? A. There is a study-hall in another building from the high school building.

Q. Is there a Science Labtoratory at the Negro school? A. They have Science classrooms—a combination of classroom and laboratory.

Q. Would you tell the Court what kind of facilities you have for a Science laboratory there? A. At which school?

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Q. At the Field School? A. I do not know what facilities they have.

Q. Would you tell the Court what facilities you have at the white high school for a Science laboratory? A. We have a building which was purchased several years ago along with a residence. This building had been used by a man in the barbecue business, a block building, he used that for packaging and preparing of his barbecue meat, and that building is used as a Science laboratory and classroom.

Q. Do you have adequate facilities there for a Science laboratory? A. No.

Q. But are the facilities there more adequate than at the Negro school? A. I would say maybe a little better, but they can't be much better. The facilities in the Gould

high school Science Department is a combination of a teacher's desk and a students' desks and some gas outlets for the furnace.

Q. Do you know whether there is a sealed gas outlet for a furnace for whatever you call it—science, or what have you—at the Science laboratory at the Field high school? A. I presume they do.

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Q. Do you know whether there are any test tubes in the laboratory? A. I do not know what equipment they have.

Q. Have you earmarked any money for use for a laboratory in the Negro school? A. We have earmarked, as such, for that in either school.

Q. So it's up to the discretion of the Principal to determine where the money is used? A. That's right.

Q. Are pupils at the Gould high school required to pay a laboratory fee? A. They are not.

Q. Are Negro pupils at Field high school required to pay a laboratory fee? A. I do not know. Their Principal could probably answer that question.

Q. Mr. Sage, do you know how much per pupil you spend on each Negro pupil who attends Field high school? A. No.

Q. Isn't that amount less than the "per pupil" expenditure on pupils in the Gould high school? A. I expect it would be.

Q. Do Gould high school pupils have to pay an enrollment fee? A. They do not pay an enrollment fee as such—the pupils at enrollment.

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Q. Does it come at high school then? A. No.

Q. All right. Do the Field High school pupils have to

pay an enrollment fee? A. I think maybe they have in the past. They were supposed to discontinue it.

Q. You don't know whether it was discontinued this year or not, do you? A. No.

Q. You assume that it was. Are there any compulsory—

The Court: Why would there be an enrollment fee?

The Witness: I think they use that term to cover "library", "laboratory" and "work book" fees.

The Court: But you had none at the white high school?

The Witness: No, sir.

The Court: Do those people coming in from that other School District pay a tuition fee?

The Witness: The school District pays it for them.

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Q. (Mr. Walker, resuming) Are there any compulsory fund drives in the Gould high school? By that I mean are there any compulsory fund drives that require the pupil to stay out of school in order to raise money? A. No.

Q. (Continuing) To go to work on a special project like picking cotton? A. They have drives in which classes work after school to raise money.

Q. Do you know whether Negro pupils are required to miss days from school in order to pick cotton to raise money for fees—

The Court: Raise money for what?

Mr. Walker: For fees, and for other fund-raising projects?

A. I have been told they have in the past and they were instructed to discontinue that.

Q. Do you know whether that practice has been discontinued? A. (None).

The Court: Now you say they were required to miss school. You don't mean they were required by the school authorities to miss school, do you?

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Mr. Walker: No, I mean, Your Honor, that the School District, or its employees have required pupils to leave school to pick cotton to earn money for the School District.

The Court: You mean to pay these fees?

Mr. Walker: For special fund drives.

The Court: Special fund drives?

The Witness: I don't know what you are talking about.

Q. You don't know anything about that. You don't know whether pupils have been required recently to miss school in order to pick cotton to raise money for the Field School? A. I have been told that, it was rumored—it came in a round-about-way, that they had been, and they were instructed if that has been the practice to discontinue it.

Q. When did you instruct the Principal to do that? A. At the beginning of the school year.

Q. You never instructed him to discontinue that last year or either of the preceding— A. I didn't know they were doing that last year.

Q. You did not know— A. When the information come to me that's when I gave instructions to discontinue it.

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Q. Isn't it true that you have had frequent meetings with a Negro PTA there which brought these kind of problems to your attention?

The Court: Say that again?

Q. Isn't it true that you have had meetings with members of a Negro PTA, the members of which have brought these kind of problems to your attention in the past? A. We have had representatives of that PTA come to me maybe once a year, but that particular problem you mention, that was mentioned by them.

Q. All right. Now, Mr. Sage, let me go back to the physical facilities again. Isn't it true that every pupil who attends Gould high school has an individual desk and chair? A. I believe they do.

The Court: That's "high school" we're talking about.

Mr. Walker: High school.

Q. (Resuming) I show you here a picture of a classroom at the Field High School and ask you to identify that. A. That seems to be a picture of a classroom at Fields.

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Q. Now, I— A. Let me amend my statement about each pupil at Gould high school having individual desks. They have an individual desk or chair. There are several classrooms in which they have a simliar arrangement in this picture here, that is a folding table and folding chair, three on each side sit at the table.

Q. Isn't it true that this is the pattern of all the seats

in the high school, at the Field High School? A. They have some classrooms with individual desks.

Q. But not very many. A. I don't know how the numbers would compare.

Mr. Walker: I would like to have this marked Plaintiffs' Exhibit 2, and introduced into the record.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 2, previously marked for identification, is received in evidence and made a part of this record.)

Q. Mr. Sage, how was the Gould High School heated? A. Each classroom has a heater controlled thermostatically.

Q. Would you describe that as central heating? A. No.

Q. All right. Would you describe the kind of heating that you have at the Negro high school? A. The same as that at the Gould high school. Individual heaters in each room.

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Q. Now, I ask you, isn't it true that you have gas stoves at the Negro Field high school, which are unvented?

The Court: Wait a minute. Gas stoves at the Field high school—

Mr. Walker: Which are unvented.

The Court: Now, what is "unvented"?

Mr. Walker: That means there are no vents there to keep the gas fumes from going out into the classroom.

The Court: You mean you have gas stoves at Fields that do not have vented flues? Is that what you asked?

Mr. Walker: That's right.

The Court: All right.

A. I could not answer that.

Q. You don't know? A. I know the rooms have gas heat. Whether they are vented or not, I don't know.

Q. You would say that the heating at the white school is superior to the heating at the Negro school?

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The Court: He hasn't said that.

A. No, I haven't said that at all.

Q. Would you say that? A. No, I would not.

Q. All right. I show you here a picture of a vent in one of the white schools, and ask if you can identify that? A. Yes.

Q. And that can be controlled by a thermostat on the wall, is that right? A. That's right.

Q. All right. How do the stoves in the Negro school differ from this? A. I am not familiar enough with the stoves in there to say how they differ.

Q. All right. You don't know. A. No. I know each individual room has its own heater.

Q. It's own gas stove—an upright stove? A. I don't know whether it's upright. I know that the main entrance there is suspended to the wall—

Mr. Walker: I would like to have this marked as Plaintiffs' Exhibit 3 and introduced into the record.

Mr. Light: May I see it?

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(Mr. Light examines the marked Exhibit 3)

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit No. 3, previously marked for identification, is received in evidence and made a part of this record.)

Q. Now, I show you this picture of a stove in the Negro school and ask you do you recognize it? A. I don't recognize it, no.

Q. Does this setting in the background look familiar to you as being part of the Field school? A. No, I couldn't identify that as being in the Field school, or a residence, I don't know that.

Q. Now, do you have rest-room facilities within each building at the Gould high school and elementary school? A. That's right.

Q. Now, are those facilities in good repair and are they adequate? A. Yes, they are kept in good repair.

Q. I show you here a picture of a certain facility in the Gould high school and ask you to identify that. A. That seems to be from Gould high school.

The Court: Is that No. 4?

Mr. Walker: No. 4, and I have it marked as Plaintiffs' No. 4, Your Honor. This is a picture of the

bath-room facilities at the Gould High. (Mr. Light examines the exhibit)

The Court: Did you mean to offer it?

Mr. Walker: Yes, I plan to have it offered.

The Court: It may be received.

(Whereupon, Plaintiffs' Exhibit No. 4, previously marked for identification, is received in evidence and made a part of this record.)

Q. Now, would you state to the court again where the bath-room for Negroes at the high school is located? A. It's in a separate building near the high school building.

Q. All right. Would you say that the facilities of the bath-room for Negroes are equal to the facilities of the bath-room for white pupils? A. I would say this, that they have the same fixtures that we have in ours.

Q. That "we have in ours", what do you mean by that? A. That are in the Gould high school.

Q. All right. I show you two pictures here and ask you if this isn't a picture of the bath-room, one side of it, at the Field High school? A. That's right.

Q. And I show you a second picture and ask you if this

isn't a picture of the facility within the bath-room? A. That seems to be, yes.

Mr. Walker: I would like to have these marked Plaintiffs' Exhibit 5 and Plaintiffs' Exhibit 6, and introduce them into the record please.

The Court: Plaintiffs' Exhibits 5 and 6 are received.

(Whereupon, Plaintiffs' Exhibits 5 and 6, previously marked for identification, are received in evidence and made a part of this record.)

Q. Now, this means that in inclement weather Negro pupils who have a need to use the bath-room, are required to come outside and expose themselves to some sickness or possible illness to get to the bath-room, doesn't it? A. I don't think they would be exposed enough to make it a hazard to their health to get the distance of a few feet going to the building.

Q. But, nevertheless, they do have to come out of the building in order to get into— A. Yes, they do have to leave the building.

Q. Right. But pupils in the Gould high school and elementary school don't have to leave the building for anything, do they? A. They do not have to leave the building.

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The Court: What was Exhibit 3?

Mr. Walker: That shows the central heating.

The Court: Oh, yes.

Q. (Mr. Walker, resuming) Now you have a number of courses at the Gould high school, which are not offered at the Field high school, isn't that true? A. We have a number—Number One I think it is.

Q. What do you mean by that? A. We have vocational agriculture that is offered in the Gould high school, that is not offered at Field.

Q. Is that the only course? A. That's, as far as I know, that's the only one.

Q. Don't you offer Journalism at the Gould high school? A. We put Journalism in this year, but not last year.

Q. But you don't offer it at the Field school, do you? A. No.

Q. Do you offer Literature at the Gould school?

The Court: What do you mean? Are you talking about the English course? English courses in Literature?

Mr. Walker: Yes.

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A. Literature is offered as a part of the English course.

Q. Don't you have a special course in Literature? A. We do not.

Q. Do you have Chemistry at the Gould school? A. Yes.

Q. Do you have Chemistry at the Field School? A. We do.

Q. Do you have advanced Chemistry at the Gould school? A. We do not, there is one year of chemistry.

Q. One full year? A. Yes.

Q. Do you have that at the Negro school? A. At the Negro school we have chemistry and biology offered each year. At the Gould school we alternate chemistry and biology each year.

Q. All right. Now, Mr. Sage, do you have a copy of the District's Desegregation Plan with you?

Mr. Light: I can supply one.

Mr. Walker: Generally, for the Court's information, would you relate what that Plan is?

A. Generally that Plan involves a Freedom of Choice for all pupils in all twelve grades, with the one exception that the U.S. Office of Education amended our Plan so as to

not require the full Freedom of Choice in Grades 5, 10, and 11.

Q. You say the Office of Education amended your Plan? A. They suggested that amendment.

Q. The office of Education suggested that you not desegrate Grades 5, 10, and 11 this year?

The Court: I think I know what he means. After he submitted a Plan for all twelve grades, he submitted an amendment to the Plan which they approved.

The Witness: That's right, but the initiative of the bill leaving out the three grades came from the U.S. Office of Education.

The Court: I didn't understand that.

The Witness: Yes.

Mr. Walker: In other words they called you. Do you have anything to show that in the record?

The Witness: I don't know whether—do we have that, Mr. Light? I know it's in the letter?

Mr. Light: The entire assembly delaying your Plan was in some papers I gave you, including the

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letter from the Office of Education.

The Witness: May I see a copy of that then, Mr. Light?

Mr. Light: Sure.

(Counsel and the witness examine the papers in question.)

The Court: Did you first submit the Plan for Grades 1 to 12?

The Witness: That's right.

Mr. Light: By agreement with Mr. Walker, Your Honor, I offer the group of papers, now in Mr. Sage's custody, as Joint Exhibit No. 1 and identify it as the Plan of Desegregation of the Gould School District—

The Court: Let's don't have two Number One's, that just complicates the thing. Just make it Number—Call it Plaintiffs' No. 7.

Mr. Walker: Plaintiffs' No. 7.

The Court: That's right. Unless you have some strong feeling otherwise.

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Mr. Light: None whatever. I just merely want to identify it as the Desegregation Plan, accom-

panied by all of the amendments, letters and so forth.

The Court: All right. I think it ought to be in the record.

(Whereupon Plaintiffs' Exhibit No. 7, constituting a group of documents, amendments, letters, etc., previously marked for identification, is received in evidence and made a part of this record.)

Q. (Mr. Walker, resuming) I would like for you to look at that letter, Mr. Sage, that the Office of Education wrote to you, with regard to Grades 5, 10 and 11, and I ask you isn't it true that the Office did not require you to exempt Grades 5, 10 and 11 from your desegregation plan for this year? A. They gave us the privilege of excluding those three grades from the general Freedom of Choice.

Q. They gave you the privilege, and they did not require that you do that? A. The wording of it, "in grades 5, 10 and 11 in 1965, as many Negro pupils as possible who chose a previously white school will be accepted"—

Q. As many as possible? A. (Continuing) And in 1966 that all grades would be accepted without any exception.

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Mr. Walker: I think that the letter will speak for itself, Your Honor.

Q. (Resuming) Now, you do not include in your desegregation plan for this year grades 5, 10 and 11. Is that right? A. They are included. We have some Negro pupils in each of those grades.

Q. On what basis did you decide to let some Negro pupils into those grades and exclude others generally? A. We

used "proximity to Negro schools". Those who lived nearest to the Negro schools. Some were living across the street or within a block or two blocks of the Negro school.

Q. Isn't it true—

The Court: In proximity to what school?

The Witness: The Field school.

The Court: Now wait a minute. Don't you mean the white school?

Mr. Walker: You mean to the—I'm sorry.

The Court: Predominantly white school?

Mr. Walker: I don't know what he means.

—45—

The Court: What you said was that the ones that lived close to the Field school, you let them go to the other school.

The Witness: The ones that lived closest to the Fields School were the ones that we let go to that school.

The Court: I misunderstood you.

Q. (Mr. Walker, resuming) Now, isn't it true that, of all the Negro pupils who are enrolled in Grades 5, 10 and 11, that those pupils live outside of the Gould School District?

The Court: Mr. Walker, I'm sorry. Say that again?

Q. Isn't it true that all the Negro pupils who were admitted to grades 5, 10 and 11 live outside of the Gould School District? A. I do not know if they all live outside of the Gould School District—

Q. Let me put it this way, don't they all live in Wells Bayou? A. From Wells Bayou? I'm not prepared to say that they all live outside of the District.

Q. Didn't you put a notice, two days before school started, maybe three, on September—I forget the exact date, but the Friday or Saturday preceding the date school started, which stated that grades 5, 10 and 11 would be

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closed to all Negro pupils this year? A. No, we did not.

Q. What did that notice say, Mr. Sage? A. There was a letter sent to the parents of those pupils what we were not accepting them in the Gould high school. Those Negro pupils whom we were accepting in those three grades we did not send a letter to.

Q. Did you not have printed in the newspaper that grades 5, 10 and 11 would be closed this year? A. We did not.

Q. Do you have a copy of the letter that you sent to the Negro parents? A. I do not have one with me, but that letter was sent only to the parents of those whom we were not accepting.

Q. I would like to know now, how again did you determine which ones you would accept and which ones you wouldn't?

The Court: Who made the choice, Mr. Sage?

The Witness: The School Board and I together.

The Court: How many of them are accepted in those three grades?

The Witness: I don't know whether I have to figure or whether Mr. Light has them. We accepted

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one in the fifth grade, nine in the tenth grade and two in the eleventh grade.

The Court: All right, Mr. Walker.

Q. I ask you again, aren't all those pupils from Wells Bayou? A. I do not know that they are all from Wells Bayou.

Q. You don't know where they were from. A. The fact that they lived in Wells Bayou was not one of the factors on which they were accepted.

The Court: What were the factors, Mr. Sage?

A. We looked at it this way—say in the fifth grade, for example, if we had six more that applied than we could have room for, we took the six that lived nearest to Field school to send back to that school. That's the basis we worked on.

Q. But now pupils who live in Wells Bayou live closer to the Field School—

The Court: No, of course they don't. They come in on a bus.

Mr. Walker: The thing is, they might have to pass Field School in order to get to it.

A. (Resuming) All right now, you said once you got up to this overcrowding level, you then started turning Negro

pupils away? A. In those three grades.

Q. In those grades.

The Court: Why were those three grades more crowded than the others—or were they?

The Witness: They were. That was of course during the summer when the projected enrollments, taking the—

The Court: Do you have a bulge in those three grades?

The Witness: A what?

The Court: Do you have a pupil bulge in those three grades?

The Witness: In those three grades the projected enrollment showed more than in any of the other grades, adding the ones that were in the Gould School last year plus the ones who signed up on the Freedom of Choice plan to come to that school.

Q. Isn't it true, Mr. Sage, that Grade 11 at the Negro Field high school is overcrowded? A. I don't know what it is.

Q. Isn't it true that grade ten at the Negro High School

is overcrowded? A. It is not overcrowded in the sense with the number of teachers they have.

Q. No, no, the facilities that they have and of course the number of teachers they have. A. The tenth grade in the Field high school has a larger number than should be assigned to one class, but they haven't enough teachers available with proper distribution that could be made in two sections.

Q. But nonetheless it is overcrowded, isn't it? Isn't it true that the Negro school is grossly overcrowded right now. A. I wouldn't say that it's grossly overcrowded.

Q. Isn't it true that it's overcrowded? A. It's overcrowded to a small degree.

Q. All right. Now you have 350 pupils approximately in the Gould school, that is in the predominantly white schools? A. About 365, I believe.

Q. And you have about 560—did you say—in the predominantly Negro Field School? A. I would have to check, if you would allow me to ask the Principal of the Field School.

The Court: Yes, go ahead and ask him. Off the record, let him ask him. That's off the record.

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(Mr. Walker conferred with the Principal of the Field school off-the-record).

The Court: (On the record) Let's give those figures that you just got Mr. Sage.

The Witness: I would say about 365 at the white school—that's for all twelve grades.

The Court: All right. 365 white and how many Negro?

The Witness: I believe he said 478.

Q. (Mr. Walker, resuming) But, now, isn't it true that for those 365 pupils in the Gould school, you have almost as many teachers as you do for the 478 pupils in the Negro high school? A. We have three more Negro teachers at that school than we have at the white school.

Q. So that the Negro teachers have a far higher pupil-teacher ratio?

The Court: It doesn't appear so.

Mr. Walker: All right. Let's check it.

The Court: It's about a hundred difference.

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Mr. Walker: All right, Your Honor.

Q. You have fourteen white teachers, is that right? A. That figure "fourteen" includes the head teacher and the librarian who did not have a full schedule of classes.

Q. You have fourteen at the white school and seventeen at the Negro school, including the Principal, so you have sixteen teachers at the Negro school since he doesn't teach anything you said? A. That's right.

Q. May I ask your indulgence for a minute, Your Honor. (Mr. Walker referred to his papers) Quick figures show that you have approximately one teacher for every thirty pupils at the Field School, and approximately twenty-six for every teacher at the Gould School.

The Court: What figure are you using?

Mr. Walker: 365 and 478.

The Court: I know, but what are you dividing 365 by?

Mr. Walker: 365 by 14.

The Court: By 14 classroom teachers?

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Mr. Walker: Yes.

The Witness: Now all of those are not classroom teachers. That 14 includes the man who serves as Principal.

Mr. Walker: But he also teaches a full load—

The Witness: It would not be "full".

Mr. Walker: Well, almost a full load.

The Witness: He teaches four classes.

Mr. Walker: How many more would a full teacher teach?

The Witness: In arriving at your figures at the Field school you did not include the Principal.

Mr. Walker: But the Principal doesn't teach anything at all. That would come up with about 14 full teachers.

The Witness: If we did not give our Principal any classes to teach the figures would be about equal, but we do not have enough teachers and had to give him classes to teach.

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Q. (Resuming) All right, Mr. Sage. Aren't the Gould public schools, white for the most part, less crowded than the Field school? A. They are less crowded in some instances and more crowded in some grades—

Q. I am speaking generally, Mr. Sage. A. (Continuing) —some grades in the Field Elementary School. If you include the Elementary School too, some teachers in the Gould School have more pupils than the same grade has in the Field School.

Q. Generally, aren't the Field schools more crowded than—

The Court: Now, does the word "Field" apply to the high school—

Mr. Walker: Both of them.

The Court: All right. Excuse me, Mr. Sage. Go ahead.

A. (Continuing) I would say that in some grades the Gould School is more crowded and in some grades the Field School is more crowded. In some of the grades they have fewer pupils to teach than in the Gould School.

Q. What do you, in the case of overcrowding in a Negro school, do—do you assign those pupils to the white school if the grades which are overcrowded are not overcrowded

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at the white school? A. No, we do not assign them unless they had indicated a preference for that school on the registration sheet we gave out in the Spring.

Q. Mr. Sage, do you have very many pupils who failed to return their preference forms to you? A. Who failed to return them?

Q. Yes. A. I don't know of any who failed to return them. I didn't check on each individual pupil at the Field School that the pupil returned their sheets to the teachers.

Q. Did you send preference forms out to the white pupils? A. Certainly.

Q. All right. Now, then, how many of those failed to return their preference forms? A. I don't think any failed to return them.

Q. You don't know though? A. In fact I know there didn't anybody fail to return them.

Q. So, you got preference forms from every pupil in the School District, to your knowledge. Isn't it true, Mr. Sage, that you and certain of the Board members have obtained an injunction against several civil rights groups in Gould enjoining them from making any protests about conditions in the School System there? A. I do not know the wording of an injunction. The injunctions I assume you are

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referring to are injunctions against mass demonstrations or picketing in the vicinity of the Gould high school.

Q. In the vicinity of the predominantly white school? A. Yes.

Q. All right. Isn't it also true that you have issued orders which forbid the Negro PTA from meeting in the high school—the Negro high school? A. That is right.

Q. What's your reason for that, Mr. Sage? A. The reason for that is, as I understand, the PTA had evolved into largely a protest group against the School Board and the policies of the Board. The members of that organization were the same who planned to demonstrate against the Gould high school and had sent chartered bus loads of people to Little Rock to demonstrate around the Federal Building, who were getting a chartered bus of sympathizers to come to this hearing today and it does not seem right to us to furnish a meeting place for a group of people that is fighting everything we are trying to do for them.

Q. This means that you have in effect held that the Field High School patrons cannot have a PTA organization? A. They can have a PTA but they can meet somewhere else.

Q. Do you know whether any of your employees, mean-

ing the Principal of the Negro School, or anybody else employed by you, discouraged Negro pupils from exercising choices for the Gould high school? A. I don't know of any such method.

Q. All right. I want to go back and ask you what are your specific plans for faculty desegregation?

The Court: Let's take a recess for ten minutes.

(Whereupon, a recess was taken, after which the following proceedings were had in open court:)

The Court: Come around, Mr. Sage.

WHEREUPON, T. RAYMOND SAGE, resumed the witness stand for further examination, as follows:

Direct Examination by Mr. Walker (Cont'd):

Q. Mr. Sage, will you state to the Court whether, in your opinion, Negro pupils are given equal treatment—Negro pupils who attend Field high school are being given equal treatment as the pupils who attend the Gould high school? A. Yes, I think they are.

Q. Do you have any plans for giving them better treat-

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ment? A. In what respect?

Q. Any respect. A. We have plans for providing better facilities for them.

Q. Would you tell the Court about those plans? A. We are going to apply this year—the new Federal Aid to Secondary & Elementary Education, the terms of that Act—we are going to apply for funds for a lunch-room and for a shop and Teacher, and Industrial Arts, which is similar to our shop in the Vocational Agricultural Department. I have talked with officials—spent the afternoon yesterday afternoon—talked with the State Department officials and they have indicated that those requests will be granted. So we intend to do that much immediately—lunch-room and Industrial Arts course would be put in before the end of this year. We intend to build a completely new school, to abandon the Field High school, during the year of 1967.

Q. During the year 1967? A. Yes.

Q. To be open for use in 1968? A. To be open in the Fall of 1967.

Q. To be open in the Fall of 1967? A. We would like to do it sooner, but there are two reasons that we can not.

In orded to do that, of course, we will have to have a bond

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issue. At the present, according to State law, our borrowing power, which is fifteen percent of our assessed valuation, is not sufficient to build a new school. By January of 1967, that borrowing power will have increased by the amount that we have paid off on the indebtedness. In 1966 and '67, it will be increased to a point that we can build. Also we have a bond issue at the present which will be paid off by January 1, 1967. A new bond issue can be made without increasing the millage rate at that time because this bond issue that will be paid off in January '67, has nine mills—

The Court: What is your millage now?

The Witness: Forty-seven, which is well above the average.

A. (Continuing) When that issue is paid off in '67, this nine mills can be transferred to the new bond issue without increasing our millage. We plan to put that on the ballott—school election—in September 1966.

Q. Do you have any other plans? A. Other than building what I have mentioned—lunch-room and industrial arts department and a new high school building—other plans would include taking advantage of the new Federal Aid to Elementary and Secondary Education, as far as personal services to pupils is concerned.

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The Court: What do you call that program?

The Witness: That's Federal Aid to Elementary and Secondary Education.

The Court: Federal Aid to Elementary and Secondary?

The Witness: That's right.

Q. (Mr. Walker, resuming) Let me get this straight. What you plan to do, among other things, is to tear down the Negro high school? A. To tear it down, or if someone wants to buy it and wheel it off—

Q. To dispose of the Negro high school? A. Yes.

Q. And you plan to replace that high school? A. We plan to build a new high school.

Q. All right. Now, you plan to have the same pupils who now attend that high school to continue attending it? A. I don't know whether they will be the same pupils or not. I assume some of the same pupils will be. Our plan of compliance under Freedom of Choice, some who are attending it now I am sure will indicate a desire to come to Gould.

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Q. Do you plan to have that school integrated? A. We plan to follow our plan, which is to give each pupil his choice of attending.

Q. All right. Would you say that the school now is a Negro school? A. The school at the present?

Q. Yes. A. The Field School is all-Negro, yes.

Q. So, that, isn't it probable that if you dispose of that property and replace it with a new facility, that it too will be all-Negro? A. It probably will for those who indicate their choice to go to that school.

Q. Now, get back to your plans for faculty desegregation, what are they? A. We have not made any definite plans for faculty desegregation because we have had so many other things to contend with, problams to be settled,

that we have kept that in the background. We want to get the pupil integration question settled and running as smoothly as possible before we go into something else.

Q. Are your faculty meetings integrated? A. We have not had any up to this point, but we will have at least two this school year, one before the Christmas holidays.

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Q. Do you have any "in-service" work shops? A. We do not have any in-service work shops in the school.

Q. Have you ever had any Principal's meetings? A. We have not had any Principal's meetings because we just have one at each school.

Q. So, that, you haven't had any integrated faculty or staff contact? A. No, but we will have before the year is out.

Q. Isn't it true that you have committed to the Office of Education, that beginning with this term your faculty meetings, Principal's meetings, Teachers' meeting and in-service work shops shall be held on a desegregated basis without regard to race? A. No, it did not say that they all would be. It said that we will have some, which we will have.

The Court: Of course, he doesn't have many Principals, Mr. Walker.

Mr. Walker: But he does have a number of faculty members, Your Honor.

Q. (Mr. Walker, continuing) All right. What plan do you have for using Negro teachers in 1966? A. We do not have any definite plan for using Negro teachers or white teachers. We don't know what vacancies we will have in 1966.

Q. You don't have any plans to generally re-assign

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teachers? A. We do not have any plans to re-assign anybody.

Q. All right. Do you plan to hire teachers next year say, for instance, if a Negro teacher applies to teach in your school system next year without specifying that he wants to teach in the Field High School, will you give him the same consideration for employment at Gould High School as you will, say, a white person who makes an application?

Mr. Light: Your Honor, if I may—Mr. Walker's question consists of the Plan. May I supply a copy to the witness so he can refer to that?

The Court: All right.

(Mr. Light furnished the witness with a copy of the Plan.)

A. (Referring to the document) This Plan says that "During the 1966-'67 school year, the administrative staff of the School District will attempt to employ Negro teachers in a predominantly white school on a limited basis, and particularly in positions that do not involve direct instructions to pupils—

Q. Let me interrupt there if you don't mind. We have made this a part of the record and the Court can see it, of course. Now, I want to know whether you prepared this

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Plan for faculty desegregation? A. I prepared all of this plan.

Q. You prepared this, but nevertheless you don't know what the plan is without referring to it? A. That we

will in '66 and '67 do just what the plan says. We will attempt to employ Negro teachers in predominantly white schools on a limited basis.

Q. I asked the question if you prepared the plan, but you are not familiar with it. A. I am familiar with it in general. I could not recall the plan word-for-word without looking at it. It's eight or ten pages of typewritten material and I wouldn't want to answer something like that without referring to this to be sure that I gave the right answer.

The Court: What page of the plan was that?
Mr. Walker: Page 5, Your Honor.

Q. (Mr. Walker, resuming) Do you have any plans for immediately closing the gap which exists between Negro teacher salaries and white teacher salaries? A. This question was answered earlier. Beginning with the 1966 and '67 school year, the gap will be closed.

Q. You are going to close it? A. Yes.

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Q. There will be one single set of salaries? A. A single salary schedule.

Q. What about for this year, do you have any plans to give the Negro teachers back pay? A. This year's contracts have already been made on the basis of expected income. We could not change this year without disrupting the—

Q. You stated before that you thought Negro teachers on paper were as well qualified as the white teachers. Now in terms of their teaching competence in the Gould District, is it your professional judgment that the Negro teachers are as well prepared to teach in the Gould public schools than the white teachers?

The Court: You asked him that once.

Mr. Walker: I'm leading up to something else, Your Honor.

A. They are as well prepared as far as I know.

Q. They are as well prepared. So, that, when teacher desegregation—when you do begin teacher desegregation, you're not going to have any Negro teachers dismissed, or you are not going to have very many Negro teachers dismissed because of incompetence in case anybody is

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dismissed? A. I can't tell you what we are going to dismiss. We are not going to dismiss anybody except for incompetence.

Q. All right. I want to ask you now, how many Negro teachers in the Field school are incompetent? A. How many are incompetent?

Q. Yes. A. I don't think any of them are.

Q. So, that, all of the people who are now teaching in the school system, once you undertake faculty desegregation, you won't have any problem with dismissals? A. No, we are not anticipating any.

Q. I want to know about this money you plan to get. Now, if you are going to build a Negro high school, it's contingent, isn't it, upon the voters approving a bond issue? A. That's right.

Q. If the voters don't approve a bond issue, what are you going to do? A. We haven't made any alternate plan because we don't have any doubt but that they will approve it. We have talked with people enough to know that they will approve it. In fact, they would like to do it sooner, and the fact that it will not involve a millage increase.

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Q. Let's assume that it doesn't pass, what plans do you have?

Mr. Light: Your Honor, I believe he has answered.

The Court: He has answered that. He said he has made no plans because he is sure it is going to pass.

Q. What plans do you have for offering the pupils now enrolled in the Field High School better facilities than they already have, come January? A. We plan to use funds from the Act that I mentioned several times to provide a lunch-room, and not only the lunch-room, but to provide free lunches for those who can not pay for them.

Q. And that's the extent of it. How much money are you going to get under the Act? A. We qualify for approximately $65,000.00.

Q. How much of that do you plan to use at the Negro school—high school? A. About $50 thousand of it.

Q. At the Negro high school? A. High school and elementary. It would be hard to break it down as to how much to use at the high school. The lunch-room would take a good part of that money—

The Court: He is not interested in that. He's

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interested in the division between the colored and the whites.

A. Well three-fourths of it at least will be used for the Field school.

Q. All right. Now, how much money can you borrow in 1966 when your other money is released? A. You mean in 1967?

Q. Yes, when you have retired your obligation in 1966? A. On the basis of the present assessed valuation of the property of the School District, we would be able to borrow approximately $100,000.

Q. Approximately $100,000. Now, I ask you, as a professional educator, isn't—could that money be better spent for the District by having whatever facilities that you plan to construct, constructed on the premises of the Gould high school, rather than in some other part of the city? A. No, I think it would be much better to build the new facility on the campus of what is now the Field Elementary school for several reasons. In the first place, we do not have room or space available on the campus of Gould to erect such a building. We do have space available on the campus of the Field Elementary school, and if we build this new school on or near the campus of the Gould high school it would be separated by eight or

ten blocks and across a main highway from the elementary school.

Q. Isn't it true that you could purchase property right adjacent to the Gould High School without too much difficulty—isn't there property available that's now being used —. A. I don't know of any property available anywhere near the present Gould high school.

Q. Isn't there farming property right adjacent to the Gould High School?

The Court: What property?

Mr. Walker: Farming.

A. There isn't.

Q. There isn't? A. There isn't any farming property that I know of.

Q. I saw a large field down there the other day, and as far as I could see was clear land. What's that land being used for? A. That land has been bought by an individual and is to be made into lots for building.

Q. But, nevertheless, in case the District were of the mind to, they could have that property condemned—put to public use? A. We could condemn it, yes.

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Q. All right. Now, isn't it true that by building an entirely new high school, you are going to be duplicating facilities that you already have? A. We plan to get much better facilities.

Q. Aren't you going to be unnecessarily duplicating some facilities? A. No.

Q. This means you are going to have two libraries, doesn't it? A. Certainly. We will have one library in each of the high schools.

Q. It means you will have to have two auditoriums, doesn't it? A. That's right.

Mr. Light: May it please the Court, I know what Mr. Walker is getting at and I suggest to the Court that it is not relevant to the issues in this lawsuit. He is getting at the future projected planning of where we are going to locate the school in this District and it's irrelevant to the issues in this lawsuit.

Mr. Walker: Your Honor, I think this is perhaps the most relevant aspect of this whole case.

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The Court: Well, I understand your point Mr. Light. I've already been very liberal in these hearings and have followed very few rules of relevance or evidence. Go ahead, Mr. Walker.

Q. (Mr. Walker, resuming) Now you have an agriculture building already? A. Yes.

Q. This means you have to build a new agriculture building, doesn't it? A. That's right.

Q. Now, couldn't you use the money you are going to use for a new agriculture building on the facility you already have at the white school, and offer better and improved facilities for all the people in the District, rather than just the few over in the Field school? A. No, because I anticipate that some students will choose to go to Field High School, and if we just have the one building on the Gould High school campus, they would have to go clear across town to get to it.

Q. But, then, maybe what I'm getting to—and I will come back to this then—is why is it necessary to have a Freedom of Choice Plan in a District so small? A. I think that that Freedom of Choice Plan is the most liberal plan that we could use and it is far more liberal than in many other schools.

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Q. Do you plan from this point on to run those schools in the District according to the Freedom of Choice?

The Court: Now, we're getting pretty far afield.

Mr. Walker: Well, Your Honor, they're committed to HEW that they are going to have Freedom of Choice for a couple of years. Now—

The Court: The next two years is as far as I'm interested in looking this morning.

Mr. Walker: All right, Your Honor.

Q. (Resuming) All right, back to the site of construction. You already have a cafeteria at the white high school? A. That's right.

Q. This means you have to spend more money to build one at the Negro school, doesn't it? A. That's right.

Q. And the same holds true for all the facilities, which are not adequate, at the white high school. Isn't that true? A. I don't follow you there.

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Q. I mean if you have an adequate science laboratory at the predominantly white high school, this means that you have to spend money to duplicate that facility at the Negro high school? A. The science laboratory today is adequate for the pupils we have there now. It would not be adequate for the total high school population of the District. Neither would our cafeteria.

Q. Now, the same holds true with the Business Department, doesn't it? A. That's right.

Q. This means that you have to spend a lot more money for equipment and for materials for the Negro school in order to just have an equal department with the white school? A. I suppose so. It would take more money to build a new building and equip it.

Q. I want you to identify these pictures for the record. Do you identify that as the front of the Gould high school? A. That's right.

Q. And this is a side view or back view of the Gould high school? A. That's right.

Q. And this is a larger picture of the Negro library, and

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this is a picture of part of the cafeteria of the white school? A. That's right.

Q. And these are parts of the premises of the Negro school? A. I couldn't identify these as to where they were taken.

Mr. Walker: I would like to have these marked Plaintiffs' Exhibits 8, 9, 10 and 11, unless you have some objections.

The Court: Write on the back of them what they are because I won't know.

Mr. Walker: All right. I won't do it now but I'll do it during the lunch hour. I wish to introduce them, Your Honor.

The Court: All right. They are received.

(Whereupon, Plaintiffs' Exhibits Nos. 8, 9, 10 and 11, previously marked for identification, are received in evidence and made a part of this record.)

Mr. Walker: I have no more questions of Mr. Sage.

The Court: All right.

Cross Examination by Mr. Light:

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Q. Mr. Sage, I believe Mr. Walker inquired about your academic training and you mentioned your college degrees. How long have you been in the business of an educator? A. More than I care to admit—since 1924.

Q. Has that all been in Arkansas? A. No.

Q. Would you just very briefly tell what experience you have had in the business of education? A. Since 1924, I have been in the business of education either as classroom teacher, coach, principal or superintendent.

Q. What jobs as superintendents did you have before you came to the Gould School District as superintendent? A. Superintendents?

Q. Yes. A. Superintendent at Mount Holly—

Q. For how many years? A. Two years.

Q. All right? A. (Continuing) At Dermot—

Q. For how many years? A. One year. And at Cotton Plant for eleven years.

Q. All right, sir, and that was all prior to your coming to Gould in your present capacity? A. Yes, sir.

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Q. I wonder if you would describe just very briefly to the Court the nature of your School District, with reference to whether it's agricultural or rural or urban or industrialized? A. Our School District is primarily rural. The prevailing economy, of course, is agriculture.

Q. What agricultural products are principal there? A. Cotton, soy beans and some rice. There is no industry in the School District.

Q. All right, sir, and what is the approximate geographical area of the District? A. Approximately eighty square miles.

Q. Is the town of Gould the only urban incorporated area in the entire District? A. That's right.

Q. And are all of the schools that you have been talking about this morning within the limits of the town of Gould? A. That's right.

Q. Is there any land in the District—any significant amount of land in the District that is not subject to the ad valorem tax from which you get your revenue to run your schools? A. Yes, the Arkansas State Penitentiary, or State Farm, as it's commonly called, lies almost wholly

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within our District and takes about—I would say—twenty thousand acres.

Q. And the District derives no tax revenue from that land, is that correct? A. Correct.

Q. Now, you have made some estimates earlier with respect to the population of the District. I'll hand you an instrument and ask you whether that is some data prepared by you, at my request, from the records of the Gould School District? A. That is right.

Q. All right, sir. Will you please refer to that and tell me what the appproximate total population of the Gould School District is?

The Court: Are you going to introduce that directly?

Mr. Light: Yes, sir, I intend to.

A. Estimated at three thousand.

The Court: The total population?

Mr. Light: That's the total population, not the school population.

The Court: The total population. Both adults and

—77—

children of the District?

Mr. Light: Yes, sir.

The Court: All right.

Q. (Mr. Light, resuming) Now, of that three thousand, approximately how many are white and how many are Negro? A. I would say an estimated eighteen hundred Negro and twelve hundred white.

Q. Now, do you have recorded on that instrument the enrollment of the schools for September 1965, and if so, would you state the enrollment of the schools that are attended exclusively by Negroes? A. September there were five hundred and nine.

Q. And how many Negro students did you have in Sep-

tember in the previously all-white school? A. Seventy-one.

Q. And how many white students did you have enrolled in September? A. Two hundred and ninety-nine.

Q. All right. In other words, your school population, the students in your schools, there are approximately two Negroes for each white? A. That's approximate.

Q. All right, sir. Now does that instrument that I just

handed you, and which I'll now mark for identification—

The Court: Defendants' Exhibit No. 1.

Q. (Continuing) Defendants' Exhibit No. 1, does that also contain a schedule of the District's bonded obligations with reference to prior bond issues? A. That's right.

Q. And is that accurate? A. That's accurate as far as I could get from our books.

Mr. Light: Your Honor, now that is the only information other than what he has already testified to, and I offer this in evidence as Defendants' Exhibit No. 1.

The Court: It may be received.

(Whereupon, Defendants' Exhibit No. 1, previously marked for identification, is received in evidence and made a part of this record.)

Mr. Light: I'll hand Mr. Walker a copy of it.

Q. (Continuing) What is the approximate budget of the Gould School District for the 1965-'66 school year? A. Our anticipated income is approximately $225,000.

Q. And is that included from all sources? A. From all sources.

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Q. Approximately how much of that is derived from ad valorem taxes? A. Approximately sixty thousand dollars.

Q. And approximately how much from State minimum foundation aid?

The Court: "Minimum" what?

A. Minimum Foundation program.

Mr. Light: That's the principal State aid, Your Honor, to—

The Court: That's what they call the State Program?

Mr. Light: Yes, sir.

The Court: All right.

A. Approximately $132,000.

Q. And do you also project some income in the form of State aid for transportation to support your bus program? A. Yes, that's approximately $14,000.

Q. All right, and do you also have some projected income from tuition (At this point Mr. Walker conferred with Mr. Light off the record) Mr. Walker has kindly consented to stipulate these figures, but this is the last one, so I'll go

—80—

ahead and inquire about it. To shorten this, do you have sixty-six students in September from the Wells Bayou District on a tuition basis? A. That's right.

Q. And is your agreement with that District an annual payment of $114.00 per student for each one you take? A. It is this year.

Q. So that would project an income of approximately $7500 from the tuition students. Very well. Now with regard to the physical facilities in the District when was the

building that is now used as the Gould Elementary school constructed? A. I believe in 1947.

Q. Was it constructed at that time for use as an elementary building? A. No, it was built for use of the high school building.

Q. And subsequent to that time it has been converted and is used as an elementary building? A. That's right.

Q. Can you tell the Court the approximate cost of construction of that building? A. I would have to refer to the bond issue for that, but I believe—I thought it was the bond issue of 1947.

The Court: $81,950.00?

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The Witness: That's right.

Mr. Light: That's correct.

Q. (Continuing) That was the purpose of that bond issue, to construct that building, is that correct? A. That is correct.

Q. Now, is there a facility in that building, the elementary school, that is now used by high school students? A. Yes, one room of this building formerly was the auditorium.

Q. The high school students use it now for what purpose? A. The high school pupils now use that as a study-hall and library.

Q. And is that room that's used by the high school students near to or far from the high school building where the high school students carry on their other activities? A. It's on the opposite end of the building from the high school building.

Q. Does this require the high school students to walk

all the way through the elementary school to get to this—A. They have to walk all the way through the elementary building, or go around outside.

Q. Now, is that a desirable situation? A. It's very undesirable and we've been told of it by the State Department—

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Q. All right, now you mentioned that the Gould high school was built in 1964. Is that correct? A. That's right.

Q. Where were the funds obtained for that purpose? A. The bulk of the funds was obtained from insurance proceeds from the fire which destroyed the building which had been used as an elementary building.

Q. Do you recall the amount of proceeds available from the insurance? A. For replacement of the building, approximately between $98 and $99 thousand dollars.

Q. And those proceeds were all consumed for the purpose of constructing this new high school building, is that correct? A. Correct.

Q. There is an allegation in the complaint that this is an airconditioned building. Is that true? A. There is one room in this new building which is airconditioned, that is the combination lunch-room and auditorium, which is called a cafitorium.

Q. All right. There is also an allegation with respect to central heating, and Plaintiffs' Exhibit No. 3 shows a register near the bottom of the floor in what appears to be a classroom, and Mr. Walker has marked on the back "central-heat". Is there a central heating system in that

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building? A. There is not a central heating system in that building any where.

Q. Is there a central heating system in any building belonging to the School System? A. There is not.

Q. Do you know the purpose of that register? Is it a circulation register, or what? A. I think that register is for return for income and outgo of air for the furnace.

Q. You have reference now to Plaintiffs' Exhibit No. 3? A. Correct.

Q. Are the laboratory and science facilities in the Gould high school—or near the Gould high school—in a separate building, adequate? A. No, they are not adequate.

Q. I don't know to what extent you described them earlier, would you very briefly say what they amount to? A. I'll tell you what building this was in, which was formerly used as a part of a barbecue business, and the changes that were put in that building to make it a science laboratory were a combination teacher's desk and demonstration desk, equipped with gas burners, and that is about the only thing we put in the building.

Q. You mentioned earlier that the building was obtained

from the previous Japanese relocation camp at Roher in 1949. Were those buildings obtained for use on both the Field campus and the Gould school campus? A. Yes.

Q. Is there a gymnasium on the campus where the Gould high school and Gould Elementary school is located? A. Yes, there is a frame building.

Q. I hand you Exhibits 2 and 3 and ask you if those are the front and side of the gymnasium? A. (Examining exhibits) This is a picture of the gymnasium.

Q. You have identified Defendants' Exhibit 3 as a picture of the gymnasium. Would you tell me what Defendants' Exhibit 2 is a picture of? A. That's the vocational agriculture building.

Mr. Light: Your Honor, I offer these into evidence.

The Court: They may be received, but before you leave write on the back what they are.

Mr. Light: Yes, sir.

(Whereupon, Defendants' Exhibits 2 and 3, previously marked for identification, are received in evidence and made a part of this record.)

Q. Are there shower facilities in the gymnasium building, that we have just referred to? A. Yes, there are

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shower facilities on one side of the gymnasium that we use as a boys' dressing room with shower facilities, and on the other side the girls' dressing room there is a—you might call it shower facilities, but I don't believe there's a shower head on—

Q. Well, I hand you what's been marked Defendants' Exhibit 6 for identification and ask you if that's a picture of the so-called shower facility for girls? A. That is right.

Q. And I hand you what has been marked Defendants' Exhibit 5 and ask you if that is a picture of some of the shower facilities in that building? A. That's right.

Q. Are these dressing rooms—the boys and girls dressing rooms—"long-like" affairs located under the permanent seats in the gymnasium? A. That's right.

Q. All right. I hand you what has been marked Defendants' Exhibit 4 and ask you if that's another picture of the dressing rooms in that building? A. That's right.

Mr. Light: I offer these in evidence, Your Honor.

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The Court: They may be received.

(Whereupon, Defendants' Exhibits 4, 5 and 6, previously marked for identification, are re-

ceived in evidence and made a part of this record.)

Q. Are there bath-room facilities, as Mr. Walker says, or toilet facilities, located in that building? A. They are very inadequate. There's one commode on each side, one in each dressing room.

Q. I hand you what I have marked as Defendants' Exhibits 7 and 8 and ask you if those are pictures of the toilet facilities located in the gymnasium building of the Gould high school? A. That's right.

Q. That's a picture of each of the two toilet facilities, is that correct? A. That's right.

Mr. Light: I offer those in evidence, Your Honor.
The Court: They may be received.

(Whereupon, Defendants' Exhibits 7 and 8, previously marked for identification, are received in evidence and made a part of this record.)

Q. Now, with respect to the vocational agricultural

building on the Gould high school campus, I'll ask you if Defendants' 9 is a picture showing the facilities in that building? A. That's correct.

Q. Does Defendants' Exhibit No. 9 portray substantially all the facilities in that building? A. Yes, sir.

Mr. Light: I offer that, Your Honor.
The Court: It may be received.

(Whereupon Defendants' Exhibit 9, previously marked for identification, is received in evidence and made a part of this record.)

Q. Mr. Sage, the vocational agricultural building at the Field high school has been mentioned—strike that please—The Home-Ec. building I believe is referred to. Is that a facility at the Field high school that is located in a separate building from the principal building? A. That's right.

Q. What type of equipment and teaching aids are available in that? A. We have approximately the same type of equipment and teaching aids that we do in the Gould high school, each is in a separate building, each was a remodeled

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building from the prisoner-of-War camp, they are equipped with the usually accepted equipment of a Home-Economics Department, such as stoves, sewing-machines and so on.

Q. And are those stoves and other facilities you have mentioned, reasonably modern facilities? A. Yes.

Q. At least of equal degree of those available to a school, is that correct? A. That's right.

Q. I hand you what I've marked Defendants' Exhibit No. 11, and ask you if that is a picture of the building containing the Home-Ec. facility at Field high school? A. That's right.

Q. I hand you what I've marked Defendants' Exhibit 12, and ask you if that's a picture of a room in the interior of that building? A. That's right.

Q. What is that room? A. That would be the sewing room I believe.

Q. I hand you what I've marked as Defendants' Exhibit 13 and ask you if that's also a picture of a room in that building? A. Yes.

Mr. Light: I offer those, Your Honor, in evidence.

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The Court: They may be received.

(Whereupon, Defendants' Exhibits 11, 12, and 13, previously marked for identification, are received in evidence and made a part of this record.)

Q. I hand you what has been marked Defendants' Exhibit 10 and ask you what that is—is that a picture of the front of the Field high school? A. Yes, that is right.

Mr. Light: I offer that also, Your Honor.
The Court: It may be received.

(Whereupon, Defendants' Exhibit 10, previously marked for identification, is received in evidence and made a part of this record.)

Q. Mr. Sage, can you tell the Court how much was spent last year on the library at Field high school, and how much was spent by the District on the library at Gould high school? A. I don't know exactly, somewhere in the neighborhood of $300 at each school.

Q. Approximately the same amount? A. Approximately the same amount.

Q. Have you been to the Field high school recently, and

are you familiar with the appearance of the library there? A. Yes.

Q. I'll ask you if that photograph that I'm marking Defendants' Exhibit 14 is a picture of a portion of the library at the Field high school? A. That's right.

Q. And I'll ask you if the pictures I've marked Defendants' 15 and 16 are additional books belonging to the library, located in the Principal's office? A. That is right.

Q. Do you happen to know, Mr. Sage, why the Principal

keeps the books pictured in Defendants' 15 and 16 in his office instead of out in the library? A. The only reason I would venture is—

Q. If you don't know, don't say. A. I don't know.

Q. All right. I'll offer those, Your Honor.

The Court: They will be received.

(Whereupon, Defendants' Exhibits 14, 15 and 16, previously marked for identification, are received in evidence and made a part of this record.)

Q. What is the most modern physical facility you have in the Gould School District? A. The most modern, the

newest, is the Gould high school, the latest one to be built.

Q. All right. When was the Field Elementary school started? A. The Field Elementary school? That was started before I became Superintendent at Gould, somewhere in the mid nineteen-fifties—is that right?

Q. Do you have any papers with you that would reflect that information? A. I don't believe I do.

Q. To refresh your recollection, didn't I hand you back some papers you prepared for my use this morning?

(The witness is looking through papers)

Is the instrument you are now referring to a summary that you prepared from the records of the District and supplied to me at my request? A. That's right.

Q. Would you please refer to it with reference to the Field Elementary school, and tell the Court when that building was constructed? A. The bond issue was April 1, 1954.

Q. In what amount? A. $45,700.

Q. Have additional sums been devoted to that school plan since that time? A. January 1, 1960, $82,400 for a gymnasium and auditorium.

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Q. And has there been any subsequent additions? A. In the Summer of 1965 two additional classrooms.

Q. In what amount? A. $9,787.00.

Q. So, the cost of that facility is approximately $138,000 if my mathematics is correct. Is that rights, Mr. Sage? A. That's right.

The Court: What did this $60 thousand in '64 go to?

Mr. Light: In 1964?

The Court: Did he say '64?

The Witness: In 1954, $45,700.

The Court: And the other figure was 1960?

The Witness: That's right, 1960, $82,400.

The Court: All right.

Mr. Light: And, again in 1965, Your Honor, $9700.00.

The Court: 1965?

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The Witness: $9,787.00.

Q. So, in terms of cost, that plant is the most expensive plant that you have in the System. Is it not?

The Court: Now, we're talking about what, the elementary school?

Mr. Light: The Field Elementary school attended exclusively at the present by Negroes, Your Honor.

The Court: Does he have a total for that?

Mr. Light: Your Honor, I've added it up—$137,887.00.

The Court: All right.

Q. (Mr. Light, resuming) Is that facility, the Field Elementary School, modern and satisfactory in every respect from an educational viewpoint? A. It's completely satisfactory.

Q. I hand you a group of pictures marked Defendants' Exhibits 17 through Defendants' 22, and ask you if those are photographs taken of various views of the interior and the exterior of the Field Elementary school plan? A. (Examining exhibits) Yes, those are all the Field Elementary School.

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Mr. Walker: Just a moment. I would like to interpose one objection to one of these.

The Court: Let's let him identify them by number first. Are you going to identify them or offer them?

Mr. Light: Yes, Your Honor, I offer Defendants' Exhibits 17 thru 22 in evidence.

The Court: Are they identified now?

Mr. Walker: Yes, they're identified as being part of the elementary school.

The Court: I know, but I mean do they have a number on the back?

Mr. Walker: Yes, this is Defendants' Exhibit No. 18.

The Court: All right.

Mr. Walker: Now Defendants' Exhibit No. 18 is a photograph which shows a part—a portion—of

the gymnasium, and the gymnasium is a part of the high school facility even though it's attached to the

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elementary school. With that statement, I would like to—

The Witness: I would like to add that that is used by elementary pupils too.

The Court: With that explanation and qualification, they will all be received.

The Witness: It's not restricted to high school students.

(Whereupon, Defendants' Exhibits 17 through 22, previously marked for identification, are marked for identification, are received in evidence and made a part of this record.)

Q. (Mr. Light, resuming) When the new high school that you propose to build within the next eighteen months or two years is constructed, will the gymnasium, a view of which is shown in Defendants' Exhibit 18, be for the use of both the high school and the elementary students? A. It will be.

Q. Is the gymnasium at the Gould high school used by both the elementary and the high school students? A. Yes.

Q. I show you what has been marked Defendants' Exhibit 23 and ask you if that's a picture of some of the showers located in the Field Elementary School gymnasium? A.

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That's right.

Mr. Light: I offer that in evidence, Your Honor.

The Court: It will be received.

(Whereupon, Defendants' Exhibit No. 23, previously marked for identification, is received in evidence and made a part of this record.)

Q. Now, there was some question, Mr. Sage, about a bond issue, or vote of the people, in connection with building the new Field high school. Is it true that if the School Board levies the same tax that it did last year in Arkansas, and the people defeat that, the tax continues at the same level as last year? A. That's right.

Q. All right. So, there's no question about the availability of this nine mills that's going to be "freed-up", so to speak, in January 1967? A. That's right.

Q. When do you plan to make application for the Federal funds for the purpose of building a lunch-room or cafeteria facility and vocational-agricultural building on the Field campus? A. Within the next ten days.

Q. Have you assurances from the appropriate Federal and State officials, that that application will be favorably

acted upon? A. I have.

Q. Where is your largest facility, landwise? Do you have a larger campus at the Gould high school and Elementary school campus, or at the Field Elementary School campus? A. We have more available space at the campus at the Field School.

Q. Is Journalism an elective course at the Gould high school? A. That's right.

Q. In other words, it's not required of all students? A. That's right.

Q. How do you determine what elective courses you will offer at any school, at the high school level? A. All stu-

dents are required to take certain subjects for four years—English, American History and other subjects are elective.

Q. Do you give any consideration as to whether or not you have a command or request from the students at a particular school, for a particular course, in determining whether an elective course would be offered? A. That's right.

Q. Did you have such a demand for Journalism at Gould? A. We had a demand for that because of the training we give the students in putting out what we call the "school

paper" and the "school Year Book".

Q. Do you have any knowledge of any demand or request for Journalism at the Field high school? A. That subject has never been mentioned. They never asked for it.

Q. I hand you what has been marked Defendants' Exhibit 24 and ask if that's a list of all of the professional personnel employed by the Gould School District? A. That's right.

Q. Let Mr. Walker examine it. Does that reflect the professional, or academic degrees, of each of those persons? A. Yes, sir, it does.

Mr. Light: I offer that in evidence, Your Honor.
The Court: It may be received.

(Whereupon, Defendants' Exhibit 24, previously marked for identification, is received in evidence and made a part of this record.)

Q. Just in brief summary, Mr. Sage, does it show that you have two teachers at the Field High school with Master's Degrees and fifteen with Bachelor's Degrees? A. That's right.

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Q. Does it show that you have only one teacher at Gould high school with a Master's Degree? A. That's right.

Q. And you have a teacher at the Gould high school deficient in education hours that has only a temporary certificate? A. That's right.

Q. Does it show that you have still another teacher at the Gould high school who has not got a certificate? A. That's right.

Q. Based on that, which school is better staffed with respect to academic credentials alone? A. The Field Elementary and High School.

Q. Now, I wonder if you would refer to the papers you were looking at earlier and tell the Court how many Negro students were rejected—that is, whose applications or preferences to attend the Gould high school and Gould Elementary school were denied in each of the fifth, tenth and eleventh grades? A. In the fifth grade there were six.

Q. The tenth grade? A. The tenth grade twelve and the eleventh grade ten.

Q. And in those three grades how many of the Negro students' preferences were granted and were thereby admitted to the Gould school? A. Fifth grade one; tenth

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grade nine; eleventh grade two.

Q. That's nine in the tenth grade? A. That's right.

Q. All right. Now would you refer to your records and tell the Court how many white students from the Wells Bayou School District are attending Gould high school, and in what grades? Let me limit that to start with, you don't have any Wells Bayou students below the ninth grade,

do you? A. That's right. They have their school for the first eight grades.

Q. And that is true with respect to both Negroes and whites? A. Yes.

Q. Very well. Now with respect to the white students from Wells Bayou, how many and in what grades? A. One in the ninth grade and none in the tenth grade, four in the eleventh and one in the twelfth.

Q. Would you give the Court the same information with respect to the Negro students in the Wells Bayou School District who are attending the Gould high school? A. Ninth grade two; tenth grade two; eleventh grade two; twelfth grade none.

Q. Now this means, with respect to your overcrowded grades, which are ten and eleven only at the high school,

that you have only two Negro students—correction, only four Negro students and four white students from Wells Bayou School District attending those overcrowded grades? A. That's right.

Q. Mr. Walker, I believe, asked you if it was not true that all of the Negro students in the overcrowded grades were from the Wells Bayou School District. I'll ask you if by referring to the fact that you have nine Negro students in the tenth grade at Gould high school, and only two Negro students at that level from Wells Bayou, if it isn't true that seven of the Negro students in Gould High school are resident students—residents of the District? A. That's right.

The Court: Let's take a recess. I see you are not through.

Mr. Light: I won't be much longer, Your Honor.

The Court: Yes, but Mr. Walker is not through. We will adjourn until one-thirty.

(Whereupon, at twelve o'clock noon a recess was taken until one-thirty p.m.)

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AFTERNOON SESSION

Pursuant to adjournment at twelve o'clock noon, the hearing reconvened at one-thirty p.m., and the following proceedings were had in open court in the presence of all parties:

The Court: Come around Mr. Sage.

WHEREUPON, Mr. T. Raymond Sage resumed the witness stand for further examination as follows:

Cross Examination (Cont'd) by Mr. Light:

Q. Mr. Sage, I believe I understood you to say that you have sixty Negro students and six white students, total, from the Wells Bayou School District. Is that correct? A. That's right.

Q. Was the Freedom of Choice Plan—

The Court: Say that again please, Mr. Light.

Mr. Light: I asked whether he had a total of sixty Negro students and six white students from the Wells Bayou School District this year.

The Court: All right.

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Q. (Continuing) Was the Freedom of Choice Plan applied by the Board in the same fashion to those students as it was to the resident students? A. Just exactly in the same manner.

Q. All right. Could the School District operate during this current school year if for any reason it were deprived of that tuition revenue paid by the Wells Bayou School District? A. I don't believe we could because that tuition would amount to approximately $7000.00.

Q. All right. You mentioned your budget for this year to be an expected revenue of about $225,000, I believe. How much are your projected expenditures in that budget? A. All but about $4,000.00 of that $225,000.00.

Q. All right. How much surplus or balance did you wind up with at the end of the 1964-'65 school year? A. Approximately $1200.00.

Q. $1200.00 out of a $225,000.00 budget. Is that typical of the sort of surplus you've been winding up with?

The Court: It's typical of a good many school districts.

Q. All right, I'll ask you— A. I would say this, that each year for the past five or six years we have spent more than we have taken in.

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Q. All right. We started this school year with about a $1200.00 balance from last year. Is that correct? A. That's correct.

Q. If, for some reason, you wanted to employ an additional teacher in your District at this time for the remainder of this school year, are there any proceeds to pay a teacher's salary? A. Not any.

Q. This cotton-picking situation has been mentioned, Mr. Sage, would you tell the Court what you know about the cotton-picking situation? A. As long as I can remember, it has been the custom at each school, the Gould as well as the Field School, for different classes to have fund-

raising projects to buy something for the use of the class, and they have money-raising activities for those purposes and I assume that this cotton-picking is one of the ways that the students at the Field high used to raise money for their classes.

Q. Is that a type of project—that is cotton-picking—that has been employed by the students at the Gould high school? A. Yes.

Q. Do they do that during school hours or on Saturdays and after school? A. On Saturdays and after school.

Q. Are there other similar projects some classes use instead of cotton-picking for money? A. Yes, car-washes.

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Q. Let me ask you this, is this a voluntary program whenever a class wants to do it or is it mandatory? A. It's voluntary.

Q. All right, sir. Does the Gould School District engage in transporting students to and from school in buses? A. Yes.

Q. How many buses do you have? A. Seven buses.

Q. Are the buses run presently, during this school, on a segregated or desegregated basis? A. They are run on a desegregated basis.

Q. In the Gould high school, do you have an athletic program? A. Yes, we do.

Q. Do you have a foot-ball program? A. Foot-ball.

Q. And a basket-ball program? A. That's right.

Q. Are any of the Negro students now attending the Gould high school participants in those programs? A. Yes, in the foot-ball program there were eight Negro boys that came out at the start of the Season practice for the team and some of them dropped out and one stayed through until about the last two weeks of the Season.

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Q. And he played and participated? A. He played in every game during the time that he was in school.

Q. And that was foot-ball? A. That was foot-ball. We have several—I don't know the exact number—we have four or five out of a total of ten or twelve boys that went out for basket-ball.

Q. Mr. Sage, as I understand it you have approximately seventy-one Negro students in the Gould high school—in the Gould schools—attending with approximately 299 or 300 white students, one in five approximately. That's the first time there has ever been any desegregation in this School District, is that correct? A. Yes, sir.

Q. With that substantial number of Negro students have you had any difficulty whatever? A. None whatsoever.

Q. Are some of the Negro students who are attending Gould High School and Elementary School, if this applies to the Elementary school, on the honor roll? A. There are several in each class.

Q. These students apparently were sufficiently prepared from their education they received in the Field School to excel academically in the Gould High School? A. That's right. They couldn't have made the honor roll attending

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here for the first time, unless they had adequate preparation before that.

Q. "Average daily attendance" is a term that, as an Educator, you frequently deal with, is it not? A. Yes.

Q. Is that a calculation you must make and report monthly to the State Department of Education and upon which the amount of State aid that is paid you, is calculated? A. That's right.

Q. Is the average daily attendance, as compared to the number of students enrolled, any different in the Field High School as compared to the Gould High School? A. I would say that the average daily attendance in the Field High School, the percentage is small.

Q. In other words, the attendance record of the Negro students in the Field High School would be somewhat less perfect than that in the other school? A. That's right.

Q. Does that then affect your practical and significant pupil-teacher ratio in the Field High School? A. It affects it a great deal. If a teacher has forty students on the roll and wouldn't average but thirty coming to school each day, it obviously lightens her roll.

Q. All right, sir. With respect to the PTA using the meeting room at the Field School, had the PTA group, prior to the time that they are privileged to use that facility

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for meeting, been using it for PTA purposes, Mr. Sage? A. They might have used it partially for PTA purposes but our understanding of it was that it was more political than PTA.

Q. Is that the reason the Board directed you to terminate that? A. That's right.

Q. Do you permit the use of any of the other property belonging to the Gould School District for other political rallies and purposes? A. None.

Q. In the formulation of the desegregation plan under which the District is now working, did you sit with, and confer with the Board while that Plan was being evolved and formulated? A. Yes, every meeting—the Board meetings and the Superintendents.

Q. Did you participate in the discussion and hear the discussion of members of the Board? A. Certainly.

Q. Can you tell the Court what the purpose or objective of the Board was in adopting and formulating that Plan? A. The objective was, first, to formulate a Plan that would be acceptable by the Department of Health, Education and Welfare, one that would work in our situation, and that

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was the Main item with which we were concerned. At that time, there were racial disturbances in other towns both in Arkansas and out of State and we wanted to avoid, as much as possible, anything like that happening in Gould. We wanted to set up if we could what we would call, you might say a model plan, one that other schools could pattern after.

Q. Mr. Sage, at the time the Board had under discussion the prospective plan, and was evolving it, were you and the Board aware that the Department of Health, Education and Welfare had published guidelines indicating they were approving plans in Arkansas taking as long as three years to complete desegregation? A. Yes, there were many schools doing that.

Q. Why did your Board elect to segregate all grades in one year in light of that? A. We did that because we thought that it would make for a smoother transition, that if we put it off and said "now let's take certain grades this year and some more next year and some more the year after that" that there might be strife, and agitation concerning that. We wanted to work this in good faith and give every student in the twelve grades a freedom of choice.

Q. In the light of the facility that you actually have available down there at Gould and the limitations on your

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financial resources, are you and the Board now undertaking

to afford every child in the District as nearly an equal educational opportunity as possible? A. We certainly are.

Mr. Light: Your witness.

Redirect Examination by Mr. Walker:

Q. Mr. Sage, you testified that one teacher who teaches in the Gould High School has a temporary certificate but is deficient in education hours? A. That's right.

Q. Is that person's name Mary Sue Halter? A. That's right. She is not in Gould High School, She is in Gould Elementary School.

Q. All right, sir. Now, what is her teaching experience? A. I don't know the exact number of years. I would say approximately five years because she taught back before I came to Gould and she taught since I have been here too.

Q. How can you justify, Mr. Sage, paying her more money than you pay any single Negro teacher in the System? A. We had arrived in the weeks before school was to start and we did not have a teacher for that grade, and no prospect of one. She had taught that grade with experience. In the past she had shown herself to be an excellent

teacher and so we just asked her what it would take to get her to come to teach.

Q. And you gave her what it would take. At the same time didn't you have lots of applications from Negro teachers who wanted to teach in the Gould School District there? A. Not for the Gould Elementary school.

Q. But just for the Gould Public School System, didn't you? A. Every application I get—I believe this is right—has been specifically for either the Gould School or the Field School.

Mr. Light: Your Honor, if I may interject this, there would be no point in pursuing that since the Board does not purport to desegregeate the teaching staff this year.

The Court: I understand. And after all, he has twice given his explanation, whether it's a good one or a bad one, the law of supply and demand.

Mr. Walker: It's a matter here of money and the District chose to divert $800 at least from—well, to use $800 that could have been used on the Negro school, which certainly needed it, to provide a teacher for the white school. I think that's the point I'm

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trying to make more than anything else.

The Court: All right.

Q. (Mr. Walker, resuming) All right, let's go to other things. You have testified that the Home-Economics Department at the Gould School and the one at the Field School were about the same, didn't you? A. Yes.

Q. And you have already identified Defendants' Exhibits 13, 11 and 12. Do you recognize them? A. Yes, that's right.

Q. Now I ask you with regard to the materials and the equipment within the Home-Economics Department of the Gould High School, what was the source, how did those things come to be there? A. The equipment?

Q. The equipment and materials and the furniture? A. It was furnished by the School Board.

Q. It was furnished by the School Board. All of that was furnished by the School Board. A. The equipment, such as sewing machines, were. Now a large part you might

say the interior decoration, was done by the teacher and her pupils. They actually got down and worked at such jobs as sanding the floor.

Q. They didn't buy any of the equipment or anything

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like that? A. They did not.

Q. Now, I ask you what is your response, what would you say if I tell you that the Negro pupils and their parents raised money through fund-raising drives to furnish and equip the Homes Economic Building there at the Negro High school? A. If they done it, I don't know that they have.

Q. Do you have a break-down of expenditures by the District for that Home-Economics program? A. I don't have it available.

Q. Do you know whether or not the living-room set that you have in that school was purchased by the students? A. I don't know how it was purchased because it was there when I came to Gould.

Q. Do you know whether the carpet that's on the floor, the rug that's on the floor, was purchased by the students? A. It was not purchased by the students. I believe there was linoleum on the floor.

Q. You're right. It was not purchased by the students. Do you know that of your own personal knowledge? A. I don't know for a fact without going back into the records to see.

Q. All right. Do you know whether the books in the library, or at least two sets of encyclopedias in the library, were purchased by the students with money they raised?

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A. I know some were purchased by students, or by the school as a result of solicitations of the citizens in town.

Q. But nevertheless the students were the ones who made the solicitation. They raised the money to buy their own books for their library? A. Partially.

Q. Do you know whether any of these students were required during school times by any person at that school, the Field school, to leave class en masse and go pick cotton to raise money for school programs? A. I do not know that.

Q. Can you deny that it took place? A. I can't deny it because I don't know one way or the other whether they were or not.

Q. Now, Mr. Light has asked you about the athletic program and you stated you have a foot-ball and a basket-ball team. Do you have a track team there or a track program at the white school? A. Yes.

Q. What other programs, extra-curricular, do you have there? A. We have the two vocational clubs, that is the FFA, the Future Farmers of America, and the FHA, the Future Homemakers of America.

Q. All right, do you have those same clubs at the Negro school? A. Yes, they do not have the FFA, no, because

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they do not have an agricultural department.

Q. Now, do they have a foot-ball program at the Negro high school? A. No.

Q. But you have more Negro students in the high school than you do at the white school? A. That's right.

Q. Do you have a track program at the Negro school? A. I don't know for sure. It seems like the Coach mentioned that they were working out in track, but I don't know whether they attend track meets with other schools, or

not. They probably have that in connection with their physical education program.

Q. Now, in order for a high school pupil to take advantage of the gymnasium for its physical education programs, I ask again how is that conducted? A. The physical education program for Field School?

Q. Yes. A. For the part of it that's conducted at the gymnasium, the students would have to go from the high school over to the—

Q. That's about four more blocks? A. Yes.

Q. So, that, in rainy weather and the like they still—

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A. They use a school bus for that. They don't have to walk over there.

Q. They use a school bus. Now, let me ask you do you know anything about a prior suit to equalize school facilities in this District? A. I don't know anything about it other than just hearsay.

The Court: You asked him that this morning, and he gave you that answer.

Mr. Walker: All right. I want to get into it now. I didn't pursue it at that time.

The Witness: I have not found any records of any.

Q. You have not found any records of any suit. Who was the Board's attorney in Gould? A. We do not have an attorney for the Board in Gould.

Q. Well, when you have persons to do legal matters, or work for you, what record is kept of the decisions and the like that are entered either for you or against you? A. Since I've been there we have been keeping them in the

Minutes of the Board. Now this is the first time we have been in a position where we needed to have a lawyer.

Q. All right. Now, are you aware that a prior consent order was agreed on by the School Board, and certain

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persons in the Negro community there, whereby the School District agreed to equalize facilities? A. I do not know anything about that other than—.

Q. In 1954. A. (Continuing)—what I've been told, just by asking around. Nobody seems to know any definite answers about it.

Q. Don't you have any records? A. There's no records in the office. I looked through our file of School Board members and I couldn't find any records.

Q. Haven't Negro patrons brought this matter to your attention since you've been Superintendent? A. That there was a prior suit?

Q. Yes. A. No, not that I recall, nobody mentioned it.

Q. Now, with regard to the political rallies that you speak of, I was under the impression that most of the pupils that participated in the picket around the court-house here, in Little Rock, were pupils? A. Some of them were but most of them were not.

Q. How do you justify excluding the PTA from meetings in the Field High School, when some of those people might not have been pickets, or even if they had been they are still patrons of the District? A. I understand that the

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plans for that march to Little Rock or demonstration at the Federal Building in Little Rock, that plans were made at the PTA meeting.

Q. How do you understand that? A. Well it just began, I couldn't give any definite proof of it. It's just what has been told. They had to meet for something. They had to meet somewhere to make plans for it.

Q. So you are going to cut out their whole PTA program on hearsay? A. We understood pretty well that that's where the plans were made.

Q. But weren't those plans to protest conditions at the Field School—weren't those PTA members constantly protesting to you about conditions in the Field high school? A. As I understand it, the protest demonstration here in Little Rock was against the Federal Court, or maybe the Office of Health Education and Welfare for approving our plan.

The Court: We're wandering far afield.

Mr. Walker: All right, Judge.

Q. Now, of the $138,000 you say you spent on the Negro school, elementary school, since 1954, isn't it true that the 'Lion's Share' of that money, approximately $95,000 of

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that money, is actually for the gymnasium which is used by all the pupils? A. I think that the bond issue was around $85,000.

Q. You don't have a copy of the budget? A. No.

Q. Could you tell the Court how much money you spend over at the Field School each year, in comparison with what you spend at the Gould School? A. No.

Q. Do you spend more for the Field School, than you do for the Gould school—high school? A. I would think so. We have more teachers to pay, we pay for operation of the buses and janitorial services and things of that kind.

The Court: Well, that wouldn't be all attributable to the Gould school. It would be attributable to both of them. Mr. Walker wasn't asking you that.

Mr. Walker: I just wonder whether you spent more money on the Negro School—

The Court: He means directly attributable—

Mr. Walker: Directly attribtuable?

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A. I wouldn't answer that. I don't have the figures to show.

Q. But you have said because you have more Negro teachers, you probably would spend more money for teachers at the Negro School than you do at the white school? A. I would think so.

Mr. Walker: At this point, Your Honor, I've already had that identified by Mr. Sage, I would like to have it introduced into the record as Plaintiffs' Exhibit 12.

The Court: It may be received.

(Whereupon, Plaintiffs' Exhibit No. 12, previously marked for identification, is received in evidence and made a part of this record.)

Mr. Walker: This sets out all the teacher's salaries for the District for 1965-'66, and I think, for the record, that it will show that Negroes, in the aggregate, earned considerably less than do white teachers.

The Court: What is that, Mr. Walker?

Mr. Walker: This is a statement which was submitted by the School District to the State Depart-

ment of Education with respect to teacher's salaries for the school year.

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The Court: Mr. Light, are you familiar with that? Have you seen it?

Mr. Light: I have not seen it but I have no objection, Your Honor.

The Court: All right. It will be received.

Mr. Walker: Your witness.

Recross Examination by Mr. Light:

Q. Mr. Sage, I'll ask you if this is a picture of the interior of the toilet facility located adjacent to the Field High School, that's been discussed here—do you recognize that, sir? A. Yes.

Mr. Light: I would like to introduce that, Your Honor, as Defendants' Exhibit 25.

The Court: It may be received.

(Whereupon, Defendants' Exhibit 25, previously marked for identification, is received in evidence and made a part of this record.)

Q. With respect to this donated equipment that was mentioned in Mr. Walker's questioning of you, Mr. Sage, is or is it not true that in a school district the size of Gould that much of the furnishings and equipment in schools are

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donated by the patrons and business houses and parents of students in the District?

The Court: I know that, Mr. Light.

A. That's right.

Q. As a matter of fact is all of the athletic equipment at the Gould high school, has it been donated by the Gould Lions Club? A. That's right.

Q. All of it? A. And private donations—

The Court: That's where you got part of your library too, from the public.

Q. That is true, is it not, part of your Library? A. Yes, sir.

Mr. Light: No further questions.

Mr. Walker: No further questions either Your Honor.

(The witness was excused.)

Mr. Walker: I next call the Principal.

WHEREUPON, HORACE EDDY DALTON, called as a witness

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on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Walker:

Q. Would you state your name please? A. Horace Eddy Dalton

Q. Mr. Dalton, how long have you been Principal of the Field High School? A. Five years.

Q. What is your experience? A. Beg pardon?

Q. What is your prior experience? A. Director of Athletics.

Q. Have you ever been a school administrator before? A. I was administrator in the U. S. Navy in World War II, Company Commander.

Q. I see. What is your educational background? A. Twenty-seven hours toward a Master's Degree at the University of Arkansas, twelve post-graduate hours at Philander Smith College, Special Work, University of Arkansas, Special Work shop course at Philander Smith.

Q. What is your under-graduate preparation? A. My under-graduate preparation, secondary education.

Q. You have a B.S. Degree I take it? A. B.A. Degree.

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Q. B.A. Degree. When is the last time you have had any teaching responsibility before becoming an administrator? A. About four years.

Q. About four years ago. What were you teaching? A. Physical education and coaching.

Q. Was the Gould Field High School your first experience as a principal? A. Yes.

Q. I see. Now, I would like for you to tell the Court, Mr. Dalton, some things about the Field high school. Would you tell the Court whether that high school is in good repair? A. It's not in the best of condition. I can say that.

Q. Have you bought some of the school's needs to the attention of the School Board? A. Yes, I have. Of course, the School Board told me that they were going to build a brand new school between 1966 and 1967, and it wasn't necessary to waste a lot of money on those old buildings.

Q. Now, Mr. Dalton, would you mind telling the Court how many books approximately do you have in the library there? A. Well, actually, since I have been there, I have bought three sets of books.

Q. What do you mean by three sets of books? A. Well just, you know—American Encyclopedia.

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Q. For the record. A. I bought a set last month—American.

Q. Where do you keep those? A. I keep those in the office because that's the only way I can keep up with them.

Q. You don't keep those books that you purchased, out in the library? A. I don't keep them out in the library.

Q. I see. You are in effect are a librarian too? A. That's right.

Q. Would you tell the Court whether or not any of the money that you used to purchase those books came from patrons of the School District? A. Yes, most of all of it came from the white patrons.

Q. You mean through contributions? A. Through contributions.

Q. But it did not come to you from the School Board, directly? A. No, No.

Q. Would you tell us about the Home-Economics Department there. What about the equipment there? A. Most of the equipment was there when I came to work.

Q. That that has been added since you have been there, how was it purchased? A. Well, as a matter of fact, we haven't had any added.

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Q. In the five years that you have been there? A. Yes.

Q. All right. Let us go to the Biology Department. Would you tell the Court how many, say test tubes—that's all I know—do you have there? A. Yes, I bought a lot of equipment last year. Test tubes, burners, and so forth, and keep them locked up in a special place because they will get away too.

Q. Do you permit the pupils to use it during any time of the day? A. That's right.

Q. Would you say that your Science facilities, your Biology facilities are adequate? A. No, I couldn't say that.

Q. Would you say that anything that is in the Field high school is adequate? A. Yes.

Q. What would you say is adequate there? A. Our gymnasium is adequate, our elementary department is adequate and I can also say that, in the long history of Gould, we never had any rating in any part of the school until last year. In my second year we got a C class rating in the elementary department.

Q. Do you know what the white elementary department's rating is? A. No, I don't.

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Q. I want to ask you something about the fees, Mr. Dalton. Have you ever required any of these pupils, any classes of Negro pupils to take time away from school to go to pick cotton to raise money? A. Now, actually what has happened, before I came there they had been doing it for years. They did it at Menefee—I worked at Menefee almost twenty years. The class would go out and pick cotton in order that the class should win "C". Now, we had a lot of complaints last year about this picking of cotton, so this year Mr. Sage told me there wouldn't be anymore picking cotton.

Q. How do you raise your money? A. We raise our money by selling hot dogs, socials or what not.

Q. Have you pointed out to the School District that you don't have a hot lunch program and that you need one? A. We worked on it last year.

Q. Did you get one last year? A. No we didn't get it, but I'll tell you what actually happened before—we had a hot-lunch program before but they wouldn't support it.

Q. All right. Let me ask you, do you permit the PTA to meet in your school? A. If it's a PTA, yes.

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Q. How do you determine whether it's the PTA? A. How do I determine whether it's the PTA? By the election that we had last month.

Q. Go ahead. A. We had a railroad election last month and people that don't belong to the PTA came there and voted. I know that to be a fact.

Q. But nonetheless you don't let them meet there now. Mr. Dalton, would you tell the Court specifically what improvements you think need to be made now, for the duration of this term, at the Field high school, in order to afford the pupils there a far better education than they are now getting? A. Well, Mr. Walker, really, the best thing I can see for improvements, is more buildings. We have a good faculty. The teachers are interested in the children and also the school program. There is nothing too much we can do at the present time with the type of facility that we have.

Q. There has been a few questions about the conditions within the school. Now those schools are heated with gas, aren't they? A. That's correct.

The Court: How long have you had gas at Gould —about two or three years?

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The Witness: Longer than that.

Q. I show you that for identification and ask you if you recognize it? A. Yes, I do.

Q. Would you tell the Court what it is? A. It's a gas stove.

Mr. Walker: I would like to have that introduced, Your Honor.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 13 previously marked for identification, is received in evidence and made a part of this record.)

Q. Now, would you say that those are the kinds of stoves that you have throughout the high school building? A. Well, those are the latest type. I'm sure of that because we bought one last year. It is insulated.

Q. All right. Now, Mr. Dalton, isn't it true that that building has a lot of cracks in it and, you know, wind just blows through during the winter time, and rain comes in through those facilities? A. No, no.

Q. That's not true? A. No, it is not.

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Q. I show you this. Do you recognize that as part of the floor?

The Court: I think everybody agrees that the building is thoroughly unsatisfactory, Mr. Walker.

Mr. Walker: I introduce 14 and 15.

The Court: They are received.

(Whereupon, Plaintiffs' Exhibits 14 and 15, previously marked for identification, are received in evidence and made a part of this record.)

Q. Mr. Dalton, just one further thing. You know the Board initiated the Freedom of Choice plan last year? A. That's right.

Q. Now, did you ever have occasion to tell any of the Negro pupils, before they made any choices, that if they

made choices for those white schools that they would in all probability have academic difficulties over there and if they went over there and failed you weren't going to let them come back? A. No. I didn't tell them that. Actually, I know from where that information came. It didn't come from me.

Q. That's all right. I have no further questions.

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Cross Examination by Mr. Light:

Q. Without regard to whether the Field high school is a pretty building or not, Mr. Dalton, is it warm enough in the Winter to be comfortable where the student can do the work? A. Yes, sir.

Q. All right. You've been principal of the high school for three years, is that correct? I believe Mr. Walker misstated and said "five". A. Yes, sir.

Q. Are you also charged with the responsibility of being Principal of the Field Elementary school? A. Yes, sir.

Q. And have you had both of those jobs for the full three years? A. I have.

Q. In that capacity, have you had occasion to work regularly with Mr. Sage and with the members of the Gould School Board? A. I have.

Q. Have you found them interested in, and cooperative with, the program you had in your schools? A. One hundred percent.

Q. Have you found them willing to donate personally from their own pockets for the projects you had in those

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schools? A. Yes, sir.

Q. Every one of them? A. Every one.

Q. With respect to the library books maintained in your

office, did I understand you to say that the reason they are not kept out in the library is because of the problem of possible theft? A. That's right.

Q. Now, are the books kept in your office freely available for the students' use? A. Yes, sir.

Q. Do they in fact use them? A. Yes, sir.

Q. Now, you have indicated that some of the money with which you purchased library books recently, came from private donations? A. Yes, sir.

Q. In addition to that, the School Board furnishes you an allocation each year of School District funds to purchase books, does it not? A. Yes, sir.

Q. Do you happen to recall what the recent allocation furnished by the District to you for that purpose was? A.

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Three hundred dollars.

Q. Now, with respect to the hot-lunch program that was once maintained at the Field School, you mentioned that they wouldn't support it. Would you explain that a little more, when they had a hot-lunch program? A. Well, actually, they had the hot-lunch program. You know if the students don't eat with the hot-lunch program, you cannot support it, and these students would take their money and buy candy and what not.

Q. You have to have a certain minimum number of students utilizing a program such as that to keep it in a financially sound basis— A. Yes, sir, and at Forrest City they are having the same trouble now.

Q. In other words, you didn't find sufficient economic demand for that lunch—not enough using it—to keep it going. Is that correct? A. That's right.

Q. But you understand the Board is now in the process of getting ready to build a cafeteria on the Field Elemen-

tary school grounds for the use of both schools? A. That's right.

Q. Thank you very much.

Mr. Walker: Your Honor, I don't care to extend the hearing unnecessarily and unduly. I would like

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to have the Court's advice as to whether you deem it important for us to put on testimony to show that there was, perhaps, discouragement on the part of the School Administrative Staff?

The Court: Well, if you like. If they have denied it categorically.

Mr. Walker: All right. And also testimony tending to show that repeated demands have been made to have the Administration improve the facilities at the Gould school?

The Court: I assume that to be true.

Mr. Walker: All right, Your Honor. Well, in that case, I want to call one of the young ladies.

(Waiting period.)

Mr. Walker: That's all right, Your Honor, we won't put on anything further.

The Court: Plaintiffs rest.

Mr. Light: Since this is a non-jury case, I suppose there's no point in making a Motion?

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The Court: I wouldn't think so.

Mr. Light: Then I'll call a single witness, Mr. Sheppard.

WHEREUPON, W. C. SHEPPARD, JR. called as a witness on behalf of the defendants, being first duly swprn, testified as follows:

Direct Examination by Mr. Light:

Q. State your name please sir. A. W. C. Sheppard, Jr.

Q. Where do you live, Mr. Sheppard? A. Gould.

Q. What's your business? A. Farmer.

Q. How long have you lived in and about Gould, Arkansas? A. Forty-four years.

Q. Are you connected in any way with the Gould School District? A. President of the Board.

Q. How long have you been a member of the Gould School Board? A. Approximately eight years.

Q. Are you, in addition to being the President, also the

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senior member with respect to years of service? A. Yes, sir.

Q. There has been some mention here of a lawsuit against the Gould School District some fifteen years or so ago. Do you have any knowledge or acquaintance of that lawsuit? A. No workable knowledge.

Q. The lawsuit occurred, if it did occur, before you commenced your service, is that correct? A. Right.

Q. Are there, to your knowledge, any papers among the records of the District reflecting anything as to that lawsuit? A. None to my knowledge.

Q. All right, sir. Did you participate as a member of the Board of Directors in the evolution and adoption of the desegregation plan that the District is now working under? A. I did.

Q. Can you tell the Court approximately when the serious discussions among the Board members in meet-

ings commenced with respect to adopting this plan? A. Restate the question please.

Q. When did the members of the Board start devoting considerable time to various discussions about adopting a

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desegregation plan and trying to decide what kind to adopt? A. After it became evident that we were going to have to integrate and it was the coming thing and we had to adjust to it, we sat down and gave it considerable consideration and tried to figure out the most workable consideration for our community.

Q. Did you meet with any people in the community and seek out their assistance and guidance and counsel in this process? A. Yes, we had special meetings both at the white school and the colored school before we formulated any plans. We had the same meetings after the plans had been formulated, and passed on all the information to both sides, both white and colored patrons.

Q. Were you aware, Mr. Sheppard, at the time you finally adopted this plan, that the Department of Health, Education & Welfare was approving many plans requiring three years to complete the desegregation process? A. We were.

Q. Why did your Board, in light of that information and knowledge, decide to desegregate entirely in September 1965? A. Like I said before, we realized that it was coming. We had to adjust to it. We thought our best

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solution was if we started at the first through the twelfth —reach all the grades—it would be easier for each individual, for each class, to adjust, rather than picking out a few grades and isolating them, and say "Well, you're picking out my kids to go to this school and my kids to

go to that one", and we thought we would give them all a freedom of choice and work out a plan that we could live with in the community and would make work, and in the cases where it was overcrowded and we didn't think it could possibly work, it would jeopardize the education of not only the colored students but the white students and everybody concerned, we wouldn't take on any more students than we could handle at the present time. We would absorb all the students that we could possibly handle and not jeopardize their education, or lower our education plans at either school.

Q. As far as the educational programs' conduct on the school properties in the District, has the plan proceeded satisfactorily? A. We have had wonderful cooperation out of the white people and the colored people. I'd say that we have got ninety-five percent of the cooperation out of both sides. And the Board as a whole—if I might elaborate just a little—has gone out of our way in going to

athletics—not just the Board, but all the people, to go to our athletic program, or any social functions and to discourage any violence or any nagging, or anything of that nature, not only with the white patrons, but the colored patrons, we've had wonderful cooperation. We've got a small minority that's not interested in our schools or our people or our economy or our welfare that don't even have kids. We haven't had any trouble out of people that's got kids that's going to school—colored or white. We've had wonderful cooperation out of them.

Q. There has been some suggestion here today that undue influence or coercion may have been exerted with respect to the exercise of the free choices that each student in the District was to have. Is there any truth to that, as far as you know, Mr. Sheppard?

Mr. Walker: Your Honor, I think this is a question that only the Superintendent—or one person, a member of the Staff can answer.

The Court: He can answer it to the extent of his knowledge. I don't know whether he knows it. You can only answer to the extent of your own knowledge.

A. Rephrase the question so that I'll know that I'm an-

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swering what you are asking.

Q. Do you have any knowledge of any such coercion or undue influence attempted to be exercised with respect to the students making their choices, that are allocated under this plan, by any employees or representatives of the Gould School District? A. None whatever, by no member of the faculty, no member of the School Board, or no farmers. In fact we have encouraged colored people to send their kids up to the white school. To the contrary, they have failed and refused—people that we thought we could talk with if something come up, that we could adjust the situation. There hasn't been any economic pressure put on. Almost every member of this Board has got colored people living on their farm that have colored children in the white schools.

Q. With respect to the fees, Mr. Sheppard, what fees are authorized by your Board to be charged to any of the students? A. None whatsoever at either school. There is fees, additionally, for equipment that the kids have to have that if it's not provided, if the parents can't afford to buy that additional equipment, and they have a project to make money, that's been done since the history of the school, both white and colored, they are permitted to and

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have through the past on off-duty hours to raise funds to pay for pencils or paper or library books, anything that the school did not have the money to furnish.

Q. I'll ask you this, with respect to pencils and supplies and work books, and things of that character that are not supplied and paid for by tax money by the District, if a child can't afford, or his parents can't afford, to purchase that, is it the practice and policy in the Gould School District to supply to that child? A. It is if at all possible. If not done by the schools, an individual will.

Q. What has the Board done during the some eight years that you have been a member, to equalize the facilities available to all the children of the District? A. We have spent seventy-five percent of the tax money on the Negro school system in the past fifteen years.

Q. When the plans that you now have—

The Court: You say the last fifteen years?

The Witness: Yes, sir. Eight of them I've been on the Board.

Q. (Continuing) When you complete the construction of the proposed high school, what will be the relative—strike that and let me approach it this way—When you complete

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the construction of the new high school, would you compare for us then the physical facilities that will exist as between the Field School and the Gould School? A. We will have more money invested in the Field High School System than we do in the Gould High School System.

Q. I did not mean to confine that to high school only. When I say "Field School" I mean grades one through twelve— A. You call it "System". I'm referring to the

Field High School System is one through twelve and the Gould High School System is one through twelve.

Q. Your physical plant will be more modern and far superior at the Field School, is that correct? A. Correct.

Mr. Light: That's all.

Cross Examination by Mr. Walker:

Q. And you say seventy-five percent of the District's fund have been spent on the education of Negro pupils in the last fifteen years? A. I didn't say "education".

Q. Well, what for? A. Facilities.

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Q. For facilities? A. Educational facilities.

The Court: The amount spent for capital improvements?

The Witness: Yes.

Mr. Walker: At this point, Your Honor, I would like to put forth a request, since we don't have anything to counter this, that the defendants provide the Court and counsel with a statement reflecting their expenditures for the last fifteen years.

The Court: Are you talking about capital improvements? That's what he is talking about.

Mr. Walker: That's right, capital expenditures.

The Witness: Perhaps you will find it in your files. We've got it filed on record with you. (Addressing the Court.)

The Court: I don't understand myself what he is talking about. See what details you can get now.

Mr. Walker: All right, Your Honor.

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Q. (Mr. Walker, continuing) First of all, we're talking about school buildings, aren't we? A. Right.

Q. Now, you're saying that between 1950 and 1965, three-fourths of every dollar that the District has received has been spent on buildings for Negroes?

The Court: He didn't say that. He didn't say that three-fourths of every dollar—

Mr. Walker: Seventy-five percent of the funds of the District.

The Witness: I said three-fourths of every tax dollar has been spent on the Negro School System, since our last bond issue which the records will show was 1954.

The Court: Let me see if I understand it. You mean out of every dollar of tax receipts—

The Witness: Right.

The Court (Continuing) —an amount equivalent to seventy-five percent—not out of every dollar or not out of every year—but over the total, seventy-five percent, or three-fourths, approximately, of all tax dollars received have been spent on capital improvements in the Field System?

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The Witness: Correct.

The Court: I understand what he is saying, Mr. Walker.

Mr. Walker: All right.

Q. (Mr. Walker, resuming) Now, let's go over those things. You are really going back to 1954, aren't you, rather than 1950? A. The last bond issue which was when

they built this elementary—which is now the elementary school at Gould High School, since that date.

Q. It was 1954. So, that's eleven years. A. The last tax money spent on the Gould School System was when they built what we use now as the Elementary School. I believe that would be in 1954.

Q. So, you're saying that tax money—the tax dollar—rather than income, was spent on capital improvements. A. That's the only income we have.

Q. And you are excluding this new school that you all built? A. The new school came from insurance replacement and tax money. It had to be—

Q. How much tax money did you put with that to

build this new school? A. We put approximately—and if I'm incorrect in that Mr. Sage can correct me—we borrowed approximately $20 thousand or $21 thousand. About seven of that was used to pay off old indebtedness. About three of it was used to complete the dressing rooms at the new school. Nine thousand of it was used to build two new classrooms at the Field Elementary School that the paint is still wet on.

Q. All right, let's go back over this. Just tell the Court, since 1954 what have you built for Negroes in the School System? A. Since 1954?

Q. Yes. A. We built nine classrooms. We completed the "gym" and auditorium with all the dressing rooms as modern as modern could be made.

The Court: The "gym" and what?

The Witness: And stage and dressing rooms. They built nine new classrooms, and the gymnasium and auditorium with the stage, and the dressing rooms and all was built with it.

Q. (Mr. Walker) Is that all you built? A. That's all.

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Q. Now, that's a total cost of $138,000? A. They got the figures—approximately that cost.

Q. Now, you came onto the Board in 1957, is that right? A. I've been on there about eight years.

Q. Now, at that time the decision which you have heard referred to was three years old, and you mean to say that you don't have any knowledge of that decision? A. Sure, I have knowledge of it.

The Court: What decision?

Mr. Walker: This is the equalization decision whereby the District agreed to equalize facilities.

Mr. Light: Your Honor, may I ask at this point, as recently as Monday when Mr. Walker and I had a conference in Gould, he and I both were still ignorant on that decision and he said he was still looking for it and I was still looking for it, and I haven't found it yet, if Mr. Walker has got it, I would be interested in seeing it.

Mr. Walker: I will make it available to you. I haven't got it yet either. I've only looked at it. It was in the lawyer's office who handled the case back in 1954.

The Court: Who handled the case?

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Mr. Walker: Harold Flowers. The Court might recall Mr. Flowers had a number of equalization suits at that time, one against the DeWitt District and one, of course, against this District—

The Court: Who represented the School District?

Mr. Walker: Mr. Meek of the Rose, Meek Firm.

Q. (Mr. Walker, resuming) But you have not spent any money at all, have you, on the high school facility since 1954? A. At either school?

Q. I mean at the Negro school? A. Both of them.

Q. But now, all this time, the Board has recognized that that Negro school has been grossly inferior, hasn't it? A. Sure.

Q. You've done nothing about it? A. We've done all we possibly can. We've exhausted every tax dollar we had available. We've done all that possibly could be done.

Mr. Walker: That's all.

Mr. Light: I have no further questions, Your Honor, and the defendants rest.

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The Court All right.

Mr. Walker: Your Honor, at this time, we would just like to put on one more witness.

The Court: In rebuttal?

Mr. Walker: Yes, Mrs. Carrie Dilworth.

WHEREUPON, MRS. CARRIE DILWORTH, called as a witness on rebuttal, on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Walker:

Q. Would you state your name please? A. Carrie Dilworth.

Q. Where do you live Mrs. Dilworth? A. Gould, Arkansas.

Q. Are you employed? A. No, a housewife.

Q. Are you one of the adult plaintiffs in this litigation? A. Yes.

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Q. Now, Mrs. Dilworth, I ask you if you were a plaintiff in an earlier action against this School District? A. Ever since the roving law school I have been working for it, since 1924.

Q. Is the roving law school that you refer to, the Field School? A. The roving law school is the Field—

Q. Is that the same building? A. The same building.

Q. Built in 1924. Has that building been improved at all since 1924? A. A little bit because they keep it painted up, and they made some additions inside the classrooms and things like that.

Q. Now, Mrs. Dilworth, in 1954, when you and other persons in Gould sued the School District for Gould, what did you seek to have at that time? A. Equal facilities—that's what we asked for, equal facilities.

Q. And do you recall what the decision of the Court was?

The Court: Now, you know I can't—

Mr. Walker: All right, Your Honor.

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Q. Have you had any discussions with members of the School Board about that decision? A. I have.

Q. Your Honor, would you permit some of that to come in?

The Court: Go ahead.

Q. Would you relate to the Court—

The Court: Let's get the times.

Mr. Walker: All right.

Q. (Resuming) Now, when after 1954, after the decision, did you have occasion to discuss the matter with the School

Board members? A. Well, I discussed with them about the hot lunch program.

Q. What year was that? A. That was in about 1954, '55, something like that. I can't tell the exact date.

The Court: When she says "them", if she knows, who did she talk to? Maybe she went to a Board meeting, I don't know. Maybe she talked to them individually.

Mr. Walker: Thank you, Judge.

A. Yes, I talked to them individually, and out at the School Board.

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Q. All right. What was your understanding of what the Board promised to do at that time with regard to the System? A. They promised to bring our school up to theirs before they put any other building on there, but it was ignored.

The Court: But what?

A. It was ignored.

Q. Mrs. Dilworth, since 1954—meaning really since 1958 and '59—have you had occasion as a member of the community, or a member of the PTA or anything like that, to discuss with these Board members and the Superintendent any of the problems of the School District? A. Well, yes, because when they came to us with this Freedom of Choice, I was the one that opened the debate that night. I asked Mr. Sage how much room did he have, and he didn't tell the exact amount, but he said he didn't know, and I told him why I asked, because we didn't have any

choice down at Fields high, and then the debate opened and others asked questions.

Q. All right. Now you heard testimony to the effect that Negro patrons did not support the hot lunch program. Is that true? A. Yes, they done the best they could. The Welfare is better now than it has been. People just didn't

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have the money at that time.

Q. All right. Would you tell the Court, Mrs. Dilworth, whether or not you are presently a member of the Field PTA? A. Yes.

Q. Do you consider the activities that you all have been doing political? A. No, it's not political.

Q. What have been the purposes of your meetings? A. Well, everything we centered on was for the school, but there was times when elections—

The Court: What election?

A. School elections when we elect a new President and things, and whenever the Chair was declared vacant they asked me if I would be chairman and I would take it up, and they couldn't hardly get a nomination, and when they do get the nominations, they got to be carried through, but we couldn't get anybody to nominate nobody.

The Court: President of the PTA?

A. That is right. There was one elected after all, but they were dissatisfied with the election.

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Q. Who was dissatisfied? A. They tell me the Principal was. I don't know who.

Q. But since then you haven't had any meetings there? A. No.

Q. I want to ask you about these cotton picking days to raise money for the School System. Do you know anything about that? A. Yes.

Q. Tell the Court. A. They picked cotton.

Q. Were they required by the School District to do this? A. They picked cotton, some would go out and pick until three o'clock—

Q. How often did this occur? A. Well, each room had their day to pick cotton.

Q. Do you know whether this has happened this year? A. No, not this year.

Q. This perhaps has stopped this year? I have no more questions.

Cross Examination by Mr. Light:

Q. Mrs. Dilworth, it is true, is it not, that the only construction over on the Gould School campus in the past ten years involved the replacement of a building that was burned? Is that correct? A. Yes, they put one new building there.

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Q. That's the only construction that's taken place on that campus where the Gould High School and the Gould Elementary School is, in the last ten years, is it not? A. I don't know that. They built a teacherage there inside.

Q. Is that on that campus? A. That's on that campus.

Q. When did they build that? A. Sometime in the past ten years.

Q. In the past ten years? A. Yes.

The Court: A teacherage?

A. Yes.

The Court: Where teachers live. Is it a bungalow or two?

A. Yes, two families.

The Court: Two-family bungalow?

A. Yes.

Mr. Light: No further questions, Your Honor.
The Court: All right. You may step down.

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Mr. Light: Your Honor, I suppose one or two questions on rebuttal about the teacherage.
The Court: All right.
Mr. Light: Mr. Sheppard.

WHEREUPON, W. C. SHEPPARD, JR., called as a witness on rebuttal, on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination by Mr. Light:

Q. Mr. Sheppard, are you familiar with the teacherage that's been mentioned? A. Yes, sir.

Q. Would you tell how that came about and when? A. There's two apartments, one for the Principal and one for the Superintendent to live in—living quarters. They didn't have any living quarters. They pay rent on the building. The building money came from a revolving fund. It was not a tax money. The rent is paid from the different apartments and goes back in to pay for the space with the revolving money.

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Q. It's something that the District runs substantially at no loss and no expense? A. No tax money involved. The rent money pays the revolving loan money that was used to build housing for the Principal and the Superintendent.

Q. And about when was that constructed? A. Approximately four or five years ago.

Cross Examination by Mr. Walker:

Q. A question—that's for the white Principal and the white Superintendent? A. Right.

Q. You haven't done the same thing for the Negro Principal? A. We adjusted his salary to take care of his rent.

Q. His salary is still less than the white Principal's and the white Superintendent's? A. Correct.

Mr. Light: Nothing further, Your Honor, and the defendants again rest.

The Court: All right. Anything further?

Mr. Walker: No, Your Honor, other than I would like to move the Court—

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The Court: Just a moment before you do that. I would like to ask Mr. Sage one or two questions.

Whereupon, T. Raymond Sage, resumed the witness stand for questions by the Court:

By the Court:

Q. Mr. Sage, did you say this morning that your Plan that's filed with the—I don't know what the office is, they

call it the HEW in Washington—contemplates that you will have freedom of choice in all the grades this next September? A. Yes, sir, in all twelve grades.

Q. Do you think that the situation you had this year might reoccur? A. We have no way of knowing. Of course, we are hoping that it won't because we are improving the facility as much as we can at the Field School. One of the reasons given for wanting to transfer was the lack of a lunch-room. They won't have that. They will have a lunch-room before this year is out.

Q. You are not planning on enlarging the facilities—that is the classroom facilities at either school this year? A. That's right.

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Q. What about this increased number of pupils in the fifth, tenth and eleventh grades? Would that move up one grade? Will the same pupils continue to attend, if they do? A. If they do we will take care of them the best we can.

Q. Suppose that two hundred of them choose to come over there? A. There will be a lot of sitting up at night worrying. We will have to make some provision.

The Court: Thank you, Mr. Sage. Anything further gentlemen? You have a Motion, Mr. Walker.

Mr. Walker: Yes, sir. Your Honor, in our prayer for relief, we pray the Court that the defendants be enjoined from expending any funds for operation or improvement of the predominantly white Gould public schools until and unless Field school is made substantially equal in facilities, equipment, et cetera, et cetera. I would like to have that request stricken, Your Honor, do you want me to read the full request?

The Court: Is it in the Complaint?

Mr. Walker: Yes, it is, it's No. III, Paragraph 12.

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The Court: Yes, I see it.

Mr. Walker: Well, we would like to have that request stricken, Your Honor, and substitute in lieu thereof the prayer to have any future high school facilities in the Gould School System constructed on or near the premises of the present Gould high school, which is now attended predominantly by white pupils, and we pray that the Court consider this as a part of our full prayer for relief.

The Court: Anything further?

That concludes the evidence and the proceedings in the case except, of course, for the Court's decision and the possibility of briefs from counsel, which I will talk about with counsel shortly. These cases always involve a great many intangible factors and some problems that, on account of money, just cannot be solved overnight. The disparity in these school systems didn't happen over-night. It came about over a period of years, and it will not be changed over-night. Of course, there was never any excuse or rational reason why the facilities of the schools attended predominantly by colored people should be inferior to that of whites. The

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point is—no one wants to wreck a School System—the point is how quickly, under the circumstances, with the money available—and, fortunately, there is money now available from the Federal Government which wasn't available before this year—how quickly can those situations be ameliorated. I know

that this is not a rich School District, agricultural as it is, without industry, and, frankly, I don't see any prospects of much industry coming into the Gould School District within the next few years. The facilities used by the white children—that is predominantly white—would be considered inferior in most of the sections of this Country, and the facilities used predominantly by the colored or even worse. Those conditions for both the white and the colored do not reflect much credit on our Society. At any rate I'll take the case under advisement and render a decision as soon as I can. Court will be adjourned.

(Whereupon, the hearing closed)

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REPORTER'S CERTIFICATE

I, Ella West, hereby certify that on November 24, 1965, I was the official reporter for the United States District Court, Eastern District of Arkansas; that as such reporter, I attended the trial captioned Arthur E. Raney, et al., versus Gould School District Board of Education, on said date before The Honorable Gordon E. Young, Judge of said court; that the parties were present by their attorneys; that I took down in shorthand all proceedings had at said trial and reduced same to typewriting, and that the foregoing pages of typewritten matter constitute a full, true and correct transcription of the proceedings taken on November 24, 1965, in said above-captioned case.

WITNESS my hand this 1st day of April, 1967.

/s/ ELLA WEST
Court Reporter

Affidavit on the Status of the New School Construction in the Gould School District (April 28, 1967)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18527

CIVIL

ARTHUR LEE RANEY, by his mother and next friend, MRS. ROXIE RANEY, *et al.*,

Appellants,

v.

BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT,

Appellee.

AFFIDAVIT

STATE OF ARKANSAS,
COUNTY OF PULASKI, ss.:

I, John W. Walker, being duly sworn, state:

(1) I am one of the attorneys for the appellants herein, and I have had occasion to travel to Gould, Arkansas in the last week and observe the state of the construction of the proposed new high school for Negroes (to be known as the Field High School) in the City of Gould, Arkansas.

(2) The Field High School for Negroes, now under construction, is being constructed on the premises of the Field Elementary School for Negroes, adjacent to the Field Elementary School and the gymnasium which were constructed several years ago.

(3) The construction of the new Field High School is partially complete but, to my observation, much work remains to be done. A number of the walls are not in; plumbing facilities and fixtures have not been added; much work remains to be done on the interior walls and upon the ceiling or roof; much work remains to be done on the floors, unless, of course, said floors are to be concrete; all of the doors and windows do not appear to be in; and a significant drainage problem will have to be corrected before the building will be ready for occupancy.

(4) The site of the new construction is approximately 10 or 12 blocks from the existing predominantly white Gould Elementary and High School.

Signed:

JOHN W. WALKER

Subscribed to and sworn before me,
a Notary Public, this 28 day of April,
1967.

ANDREW JEFFRIES
NOTARY PUBLIC

MY COMMISSION EXPIRES:
DECEMBER, 1968.

Opinion of United States Court of Appeals For the Eighth Circuit

[Filed August 9, 1967.]

Before VOGEL, Chief Judge, VAN OOSTERHOUT and GIBSON, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

This timely appeal is taken from final judgment dismissing a class action brought by plaintiffs as parents and next friends of sixteen minor Negro students attending grades five, ten and eleven of the defendants' district Negro school against the Board of Education of the Gould School District pursuant to 28 U.S.C.A. § 1343(3) and 42 U.S.C.A. § 1983, seeking injunctive relief. The prayer of the original complaint is to enjoin the defendant Board from:

> "(1) requiring minor plaintiffs and all other similarly situated to attend the all-Negro Field School for the 1965-66 School Term;
>
> (2) providing public school facilities for Negro pupils in Gould, Arkansas which are inferior to those provided for white pupils;
>
> (3) expending any funds for operation or improvement of the predominantly white Gould Public Schools until and unless the Field School is made substantially equal in facilities, equipment, curriculum, advantages, opportunities, etc. to the predominantly white Gould schools; and

(4) otherwise operating a racially segregated school system."

At the close of all of the evidence, plaintiffs amended their complaint by striking item (3) above set out and substituting in lieu thereof:

"the prayer to have any future high school facilities in the Gould School System constructed on or near the premises of the present Gould high school, which is now attended predominantly by white pupils, . . ."

Upon appeal, plaintiffs again altered their position and urged that the Board be restrained from using the new building construction as a replacement for the Field High School and that instead, the building be converted into a unit of a completely integrated grade school. The issue last stated is raised for the first time upon appeal and was not presented to the trial court and no opportunity was afforded the parties to offer evidence on the feasibility of such a plan, nor was the trial court given any opportunity to pass thereon. It is fundamental that issues not presented to or considered by the trial court cannot be considered upon appeal.

The trial court, in our view, states the issues properly raised by this appeal as follows:

"The question before the Court is actually two pronged. First, is this Court authorized to tell the school board where to build or not to build a new school building, and second, should the Court do so under the circumstances in this case?"

The trial court on the first issue recognized that under appropriate circumstances a constitutionally discriminatory construction program could be enjoined, stating:

> "However, this Court is not prepared to state that there might not be circumstances under which the Court would be justified in taking action such as that the plaintiff is asking for in this case. Assuming without deciding that this is an area of school policy-making which the Court could enter to protect the civil rights of the school district's citizens, this Court does not feel that the circumstances of this case merit such action."

Our recent decision in *Kelley* v. *Altheimer*, 8 Cir., . . . F.2d . . . (April 12, 1967), recognizes that a court may enjoin a construction program which is designed to perpetuate segregation. The supporting facts in *Altheimer* are far stronger than those in our present case. We recognized in *Altheimer* that injunctive relief against construction could not be effective after a building is constructed. Such appears to be the situation here.[1]

The trial court as a basis for its refusal to exercise its equitable powers to grant the injunction requested states:

> "Here the school board has begun a desegregation program for all twelve grades without having been ordered to do so by a court. The delay in the program for the three grades involved in this case is

[1] Attached to plaintiffs' brief is an affidavit of their attorney dated April 28, 1967 which states that the building in controversy is under construction and from which it would appear that considerable progress had been made upon such construction.

temporary and future plans call for complete integration. The fact that the Negro children who are attending the previously all-white schools are participating in the school's curricular and extra-curricular activities seems to indicate that this plan is more than a pretense or sham to meet the minimum requirements of the law.

"The availability of campus area in one place and not the other, the lack of funds to procure more land, and the necessity of locating the new high school near the existing gymnasium designed to accommodate the high school students are all valid reasons for the administration's decision as to the location of the new high school. There is no reason to assume that only Negro students will attend the new high school. In fact, it is a virtual certainty with the progress of integration, building space limitations alone will insure that the new school will be integrated. Certainly these reasons, coupled with the school board's recent initiative toward integrating the schools, do not indicate that the board's plans are solely motivated by a desire to perpetuate or maintain or support segregation in the school system. Therefore, the Court will not usurp the normal managerial prerogative of the school board to the extent of determining where the new building will be located."

We note that the Field High School which was being replaced is the oldest building in the school system. The bulk of the evidence in this case is directed at its many deficiencies and dilapidated condition. The Negro segment of the community had for years been insisting that

a replacement of such building be made and continued to assert such position throughout the trial and at least until the amendment made at the close of all of the evidence hereinabove set out. Reference is made in plaintiffs' testimony to an alleged prior action which purported to require the Board to give priority to the upgrading of the Field High School and the Board's commitment so to do. The evidence discloses that the district is weak financially and that prior construction was largely prevented by statutory limitations upon bonded indebtedness. It would appear that such obstacle would be cleared up by the completion of payments on prior bonded indebtedness by 1967. There is absolutely nothing in the record to indicate the nature of the plans for the new high school building under construction on the Field elementary school grounds. The evidence does disclose that a gymnasium and certain other facilities on such ground already in existence had been used and would continue to be used by students in the Field High School. Moreover, there is no showing that the Field facilities with the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school when the appropriate time for such course arrives. We note that the building now occupied by the predominantly white Gould grade school had originally been built to house the Gould High School.

As pointed out by the trial court, the defendant Board had voluntarily adopted a desegregation plan for the schools which it operates, the plan to be in effect in September 1965. Such plan went considerably beyond the minimum requirements of the Department of Health, Edu-

cation and Welfare (H.E.W.), providing for immediate unrestricted freedom of choice of school attendance on the part of all students, and provision was also made for faculty desegregation. The desegregation plan is similar to a plan we indicated would be approved in *Kemp* v. *Beasley*, 8 Cir., 352 F.2d 14.

Subsequently, when the students exercised the freedom of choice provided for by the plan, it developed that grades five, ten and eleven would be seriously overcrowded which led to an amendment making the freedom of choice inoperative for the 1965-66 school year with respect to grades five, ten and eleven but fully effective thereafter. The plan as amended was approved by H.E.W. As stated in *Kemp* v. *Beasley*, supra, final responsibility for determining the constitutionality of desegregation plans rests with the court but H.E.W. guidelines are entitled to considerable weight.

In *Clark* v. *Board of Education of Little Rock Sch. Dist.*, 8 Cir., 374 F.2d 569, we approved a freedom of choice plan similar to that adopted by the Board here. We stated:

> "[W]hen a student is given a well publicized annual right to enter the school of his choice, coupled with periodic mandatory choices as set forth in the Board's amended plan, we can find on the face of it no unconstitutional state action. . . .
> Therefore, if in fact all the students wishing to transfer were fully accommodated, the Constitution would unquestionably be satisfied, and apparently under these circumstances petitioners would have little objection to the plan's operation. . . ." 374 F.2d 569, 571-72.

We recognized in *Clark* that a plan appropriate on its face could be unconstitutionally administered and observed that in case of such a development, the District Court upon appropriate application could do what is necessary to bring the plan up to constitutional standards.

Prior to 1965, the defendant District had operated an all-Negro school known as the Field school and an all-white school known as the Gould school on a segregated basis. The district is a predominantly agricultural district with little industry. The population is approximately 3,000 of which 60% are Negro. There are about 880 students in the system of which 580 are Negro.

Under the freedom of choice plan adopted, all students expressed their attendance preference. Seventy-one Negroes who expressed a preference for the Gould School were accepted for attendance at that school. All preferences except those for overcrowded grades five, ten and eleven were fully respected. Twelve of the forty Negro students applying were accepted in grades five, ten and eleven. Those who were accommodated at Gould lived the greatest distance from Field. Under the plan all preferences are to be honored commencing with the 1966-67 school year.

The evidence shows that the defendant Board has taken substantial steps to narrow the gap between the salaries paid to white and Negro teachers and that any discrepancy in this respect will be completely eliminated by the 1966-67 school year. The superintendent as a witness also stated that no teachers would be discharged as a result of the integration. It also appears that the transportation of pupils has been integrated.

The enrollment at the Gould school in 1965-66 consisted of 71 Negro students and 298 white students. Thus substantial progress toward integration has been made in the first year of the plan's operation. With the restricted grades open for freedom of choice and upon the basis of the favorable acceptance of the Negro students at the Gould school, it is reasonable to anticipate that integration will rapidly progress as predicted by the trial court.

The complaint charges coercion has been used against integration. The Chief of Police of Gould was named as a defendant on this charge. The case was voluntarily dismissed by the plaintiffs against him. There is no substantial evidence that any coercion was exercised to deter Negro students from electing to attend the white school. The record fairly shows that the integration plan has operated smoothly and that the Negro students have been encouraged to elect the white school.[2]

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[2] The testimony of the president of the school board includes the following:

"We have had wonderful cooperation out of the white people and the colored people. I'd say that we have got ninety-five percent of the cooperation out of both sides. And the Board as a whole—if I might elaborate just a little—has gone out of our way in going to athletics—not just the Board, but all the people, to go to our athletic program, or any social functions and to discourage any violence or any nagging, or anything of that nature, not only with the white patrons, but the colored patrons, we've had wonderful cooperation. We've got a small minority that's not interested in our schools or our people or our economy or our welfare that don't even have kids. We haven't had any trouble out of people that's got kids that's going to school—colored or white. We've had wonderful cooperation out of them.

. . . . .

"Q. Do you have any knowledge of any such coercion or undue influence attempted to be exercised with respect to the students

The trial judge by reason of his presence at all stages of the trial has the feel of the case. The court's findings are based upon substantial evidence and are not clearly erroneous. Moreover, the trial court has a large discretion in determining whether an injunction should be granted. See 43 C.J.S.2d Injunctions §§ 14, 15, and cases there cited.

Plaintiffs have failed to demonstrate that the trial court abused its discretion in denying the injunction here sought.

Plaintiffs alternately upon this appeal ask us to issue a comprehensive decree governing the desegregation process similar to that in *Kelley* v. *Altheimer*, supra. The record in this case does not warrant such relief. Unlike the Altheimer situation, no attack has been made in the pleadings on the desegregation plan adopted by the Board. Additionally, we find no substantial evidence to support a finding that the Board was not proceeding to carry out the plan in good faith.

Primary responsibility for the operation of the public schools rests in the school board. Courts are not equipped to solve the everyday problems of school operation. The court's interference with the Board's operation of its school is justified only upon a showing that the Board in

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making their choices, that are allocated under this plan, by any employees or representatives of the Gould School District?

A. None whatever, by no member of the faculty, no member of the School Board, or no farmers. In fact we have encouraged colored people to send their kids up to the white school. To the contrary, they have failed and refused—people that we thought we could talk with if something come up, that we could adjust the situation. There hasn't been any economic pressure put on. Almost every member of this Board has got colored people living on their farm that have colored children in the white schools."

its operation of its school is depriving pupils of rights guaranteed by the federal constitution.

In *Brown* v. *Board of Education of Topeka,* 349 U.S. 294, 299, the Court states:

> "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal."

In our present case, no issue on the adequacy of the plan adopted by the Board or its implementation was raised in the District Court. Issues not fairly raised in the District Court cannot ordinarily be considered upon appeal. *Hormel* v. *Helvering,* 312 U.S. 552, 556; *Duignan* v. *United States,* 274 U.S. 195, 200; *Smith* v. *American Guild of Variety Artists,* 8 Cir., 368 F.2d 511, 514.

The judgment is affirmed.[1]

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[1] The evidence in this case was taken on November 24, 1965. Due to disability of the reporter, the preparation of the transcript of testimony was delayed and this has delayed the appeal. Since the hearing in the trial court, the 1966-67 school year has been completed and the 1967-68 year is about to commence. Our decision is based upon the record before us. If subsequent evidence should prove that the defendant Board is not fairly administering its integration plan, resort to the equitable powers of the District Court is open to any aggrieved party.

Judgment

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

September Term, 1966

No. 18,527

Arthur Lee Raney, by his mother and next friend, Mrs. Roxie Raney; Bobby Cox and Annette Cox, by their grandmother and next friend Mrs. Carrie Dilworth; Charles Washington, by his mother and next friend, Mrs. Vertis Frazier; Dennis James Bailey, by his mother and next friend, Mrs. Olens Bailey; Robert Hall, by his mother and next friend, Nonie Mae George; Wyvonne Dale, by her mother and next friend, Laverne Dale; Earnestine Dale, by her father and next friend, E. W. Dale; Irma Jean Clark, by her grandmother and next friend, Mrs. Mattie Harper; Linda Wright, by her grandmother and next friend, Mrs. Blanche Newman; Jake Taylor, Jr., and Linda Austin, by their mother and next friend, Mrs. Beatrice Austin; Willie Lee Jones and Stella Harper, by their parents and next friends, Mr. and Mrs. Rice Harper; Bobbye Carolyn Hadden, by her mother and next friend Mrs. Norma Jean Hadden; Jesteen Jasper, by her father and next friend, Jim Jasper,

Appellants,

vs.

Board of Education of the Gould School District.

Judgment

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 9th, 1967.

Order Denying Petition for Rehearing

(Filed September 18, 1967)

Appellants' Petition for Rehearing en banc or by the Panel filed in this cause having been considered, It is now here Ordered by this Court that the same be, and it is hereby, denied.

Order of the United States Supreme Court Granting Petition for Writ of Certiorari

(filed January 15, 1968)

No. 805, *Raney, et al.* v. *Bd. of Education of the Gould School District, et al.*

The petition for a writ of certiorari is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 740.

SUPREME COURT, U. S.

NOV 9 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 805.

ARTHUR LEE RANEY, *et al.*,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT, a Public Body Corporate, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1967

No. .....

ARTHUR LEE RANEY, *et al.*,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT, a Public Body Corporate, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case August 9, 1967, rehearing of which was denied September 18, 1967.

Citations to Opinions Below

The unreported opinion of the district court is reprinted in the appendix, *infra*, at pp. 1a-14a. The opinion of the court of appeals is reported at 381 F.2d 252 (8th Cir. 1967) and is reprinted in the appendix, *infra*, at pp. 15a-25a.

Jurisdiction

The judgment of the Court of Appeals was entered August 9, 1967 and petition for rehearing was denied September 18, 1967, *infra*, pp. 26a-27a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether—13 years after *Brown* v. *Board of Education*,—a "freedom of choice" plan which maintains an all-Negro school is constitutional in a system with only two nearby school plants, one traditionally Negro and the other traditionally white, although assigning elementary grades to one school and secondary grades to the other would immediately desegregate the system.

2. Whether the court of appeals erred in denying all relief, dismissing the complaint, and declining to order the district court to supervise the desegregation process on the ground that the Department of Health, Education and Welfare had initially approved the Board's plan as facially sufficient to comply with Title VI of the Civil Rights Act of 1964.

Constitutional Provision Involved

This case involves Section I of the Fourteenth Amendment to the Constitution of the United States.

Statement

Negro students filed a class action September 7, 1965, to enjoin the Gould School Board from (1) requiring them and all others similarly situated to attend the all-Negro Field School; (2) providing public school facilities for

Negro pupils inferior to those for whites; and (3) otherwise operating a racially segregated system (R. 3-8). Plaintiffs first learned of a proposed school construction program during a November, 1965 hearing in the district court, and amended to pray that future replacement high school facilities be located on the premises of the white Gould High School, rather than at the Negro Field School (R. 12, 19, 138).

Gould is a small district of about 3,000 population, and total school enrollment of 879 in the 1965-66 school year (R. 79-80). Until September, 1965, the district had not taken any steps to comply with *Brown* v. *Board of Education*, and operated completely separate schools for Negro and for white pupils with racially separate faculties (R. 31). Negro students were instructed in a complex of buildings known as the Field School, and white students were taught in a complex of buildings known as the Gould School (R. 31). The two complexes are within 8 to 10 blocks of each other; each contains an elementary school and a secondary school (R. 31, 73).

The school district did not consider undertaking any desegregation program until the United States Department of Health, Education, and Welfare issued Guidelines implementing Title VI of the Civil Rights Act of 1964 (R. 121-23). September, 1965, the district adopted a "freedom of choice" plan of desegregation for all 12 grades, but later obtained approval from H.E.W. to withdraw three grades from the plan's operation for 1965-66 because of overcrowding in those grades caused by Negro requests to go to the white school. There were no white requests to go to the Negro school. As a result Negroes, in the 5th, 10th and 11th grades were turned away from the white school (R. 53-60, 62-63). During the 1965-66 school year, the enrollment figures for the school district were as follows (R. 79-80):

	Grades	Negro	White
Field Complex	1-12	509	0
Gould Complex	1-12	70	299

During the 1966-67 school year, the second year of "freedom of choice", the enrollment figures were as follows:[1]

	Grades	Negro	White
Field Complex	1-12	477	0
Gould Complex	1-12	71	304

New Construction to Perpetuate Segregation

White Gould High School, constructed in 1964, is the most modern facility in the district (R. 89). Adjacent white Gould Elementary School was constructed originally as a high school and was subsequently converted to an elementary school (R. 81-82). The Negro Field Elementary School is also modern, constructed in 1954; gymnasium and auditorium were added in 1960 (R. 89-91). Until the 1967-68 school year Negro high school classrooms were in a building constructed in 1924 concededly obsolete and inferior to the white high school (R. 10, 16, 130).

Promises by the Board to improve the Negro high school date back to 1954, a decade before any consideration was given to desegregation, and apparently resulted from a suit to require equal facilities for Negroes (131-132, 129).

---

[1] The record in this case, like the records in all school desegregation cases, is necessarily incomplete by the time it reaches this Court. In this case the 1965-66 school year was the last year for which the record supplies desegregation statistics. Information regarding student and faculty desegregation during the 1966-67 school year was obtained from official documents, available for public inspection, maintained by the United States Department of Health, Education and Welfare. Certified copies thereof and an accompanying affidavit have been deposited with this Court and served upon opposing counsel.

Actual construction of a new high school building on the site of the Field school, however, did not begin until January, 1967. The new building was scheduled to open in Fall, 1967 (R. 65, 66).

The superintendent admitted that the old Field High School was clearly a "Negro" school, and probably would continue to be an all-Negro school if replaced with a new facility at the Field site (R. 67). He also conceded that it was inefficient for a small school district to construct a new secondary school when it already had one. There would be duplication of libraries, auditoriums, agriculture buildings, science laboratories, cafeterias, and other facilities (R. 74-76). He was asked (R. 76):

> Q. "This means that you have to spend a lot more money for equipment and for materials for the Negro school in order to just have an equal department with the white school?"
>
> He answered: "I suppose so. It would take more money to build a new building and equip it."

Plaintiffs sought to shift the construction site of the new high school to the site of the white school by a timely amendment during the hearing in November, 1965 more than a year before construction was scheduled to begin (R. 137-138). The district court refused to grant relief in an opinion in April, 1966. Because of illness the court reporter did not complete the transcript until one year later—April 1, 1967—thereby delaying determination of the appeal (R. 140). At the time the case was submitted to the court of appeals the outer shell of the new building at the Negro school site was completed.[2] Because the con-

[2] Petitioners filed in the court of appeals an affidavit of their attorney stating that the outer shell was completed but that a number of walls, plumbing facilities and fixtures and interior walls, the roof and flooring had not been completed, see *infra*, p. 18a.

struction of the replacement facility at the Negro school had progressed by the time briefs were filed in the court of appeals, petitioners asked that court to require a utilization of the Gould School site as the single secondary school, and the Field School site the single elementary school for the district. It was urged that such a utilization was practical, economical, educationally superior and would disestablish segregation.

Unequal Facilities and Programs

The record shows that for many years prior to constructing the new Negro high school the Board tolerated substantial inequalities between the segregated schools. The old all-Negro high school, a wooden frame structure, was admitted by the president of the Board to have been "grossly inferior" to the white high school (R. 10, 16, 130). He said that the reason no money was spent on the building was that every dollar available had been exhausted on other uses (R. 130). Nevertheless, a new all-white high school was constructed at the Gould site (rather than at the Negro Field site) in 1964 following a fire which destroyed the old high school building there (R. 83).

The Negro Field High School is completely unaccredited; the Arkansas State Department of Education rates the Field Elementary School class "C" (R. 31) and the white Gould Schools "A" (R. 10). The Negro school bathrooms were in a building separated by a walk exposed to weather (R. 51-52); the white schools had rest rooms in each building (R. 50, 52).

There is an agriculture building at the predominantly white high school, and a hot lunch program for elementary

and secondary students but none at the Negro site (R. 40-41). The library at the white high school contains approximately 1,000 books, and a librarian (R. 42-43). The Negro school has only three sets of encyclopedias, one purchased a month before the hearing in this case (R. 113-114). These books were kept in the principal's office, rather than in a separate library, and the principal, in effect, functions as librarian, to the extent that such function is required (R. 114). The superintendent had a complete lack of knowledge of the extent of library facilities at the Negro school (R. 42).

The science facilities at the Negro high school were inferior to those of the predominantly white high school, even though the former is larger (R. 43-44). Pupils who attend Gould generally have an individual desk and chair; the standard pattern at the old Negro school was a folding table with folding chairs and three students on each side, sitting at the table (R. 47-48).

The "per pupil" expenditure is less at Field School than for the formerly all-white, now predominantly white, Gould School (R. 44). The system has charged "enrollment fees" to pupils at Field, but not at Gould (R. 44-45). It was also the practice to require Negro students to pick cotton in the fields during class time to earn money for school fund raising projects, and to pay "enrollment fees" (R. 44-46).

Unequal per pupil expenditures are also reflected in higher student-teacher ratio at the Negro school i.e., the average class size is larger (R. 59-62). There are 14 teachers at Gould, but only 16 teachers at Field although it has about 130 more students (R. 60-61). The range of Negro teacher salaries is from $3,870 to $4,500; for white teachers, the range is from $4,050 to $5,580 (R. 33-39).

There are also disparities in course offerings. Neither vocational agriculture nor journalism, offered at Gould, are offered at Field (R. 52-53). There is a similar disparity in extracurricular activities. The larger Negro school has no football, basketball, or track programs, whereas there are football, basketball, and track teams at the white school (R. 106-107). There is a Future Farmers of America vocational club at the white school, but none at the Negro school "because they do not have an agricultural department" (R. 106).

Teacher Segregation

The school system has no plans for substantial faculty desegregation. In 1965, the Board planned to assign two white teachers to the Negro school but no Negro teachers to full teaching duties at the white school (R. 67-70). However, by the 1966-67 school year the only faculty desegregation which had taken place was assignment of one part time white teacher to the Negro school.[3] Faculty meetings had not been integrated (R. 68). At trial, the superintendent stated that "we have kept that in the background, we want to get the pupil integration question settled and running as smoothly as possible before we go into something else" (R. 68).

When asked whether re-assignments of faculty members were eventually contemplated, the superintendent stated that "we do not have any plans to re-assign anybody" (R. 69). He stated that, in compliance with H.E.W. requirements, the school system "will attempt to employ Negro teachers in a predominantly white school on a limited basis, and particularly in positions that do not involve direct instructions to pupils" (R. 69). The superintendent

[3] See Note 1, *supra*.

described the Negro teachers' academic qualifications as superior to the white teachers. Every Negro teacher had a bachelor's degree and two had master's degrees. Only one white teacher had a master's degree; two have no degree (R. 33, 94-95).

Intimidation

When the PTA at the Negro school began to protest to the superintendent and the Board the deplorable conditions at the old Negro high school the superintendent responded by issuing an order which forbade the Negro PTA from meeting in the Negro high school (R. 63-64). He stated: "The reason for that is, as I understand, the PTA had evolved into largely a protest group against the school board and the policies of the board. The members of that organization were the same who planned to demonstrate against the Gould High School and had sent chartered bus loads of people to Little Rock to demonstrate around the Federal Building, who were getting a chartered bus of sympathizers to come to this hearing today and it does not seem right to us to furnish a meeting place for a group of people that is fighting everything we are trying to do for them" (R. 64).

When questioned whether this meant the Negro high school parents could not have a PTA, the superintendent responded: "They can have a PTA but they can meet somewhere else" (R. 64). He later admitted that he had no knowledge that any plans for marches or demonstrations had been made at a PTA meeting, and that all that he heard to this effect was hearsay (R. 108-109). The superintendent and some members of the Board obtained an injunction against several civil rights groups, enjoining them from protesting conditions in the system (R. 63).

Denial of Relief by the Courts Below

The district court denied all relief and dismissed the case in an opinion April 26, 1966 (R. 12-25). The court relied on the fact that the school district adopted a plan without court order, that the plan was approved by the Department of Health, Education, and Welfare, and that some Negro students were in fact attending the "white" school. With respect to constructing new secondary school replacement facilities on the site of the present Negro school, rather than enlarging the previously all-white school, the court decided that the replacement plan was not "solely motivated by a desire to perpetuate or maintain or support segregation in the school system" (R. 24-25).

The court of appeals found that the Board was operating under a freedom of choice plan which on its face met standards approved by the circuit and the Department of Health, Education, and Welfare; that there was "no substantial evidence to support a finding that the Board was not proceeding to carry out the plan in good faith"; that progress was being made in equalizing teachers' salaries; and that relief requiring that the replacement construction be undertaken at the Gould site could not be effective because considerable progress has been made in constructing the building on the Field site.[4]

Although the court found that "There is no showing that the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school *when the appro-*

[4] Plaintiffs filed notice of appeal and oral argument was originally scheduled at the same time as a case involving similar issues, *Kelley* v. *Altheimer*, 378 F.2d 483 (8th Cir. 1967). However, the court reporter was sick for an extended period of time, and was unable to complete the transcript until April 1st, 1967 (R. 140).

priate time for such course arrives" (emphasis supplied), it declined to order conversion of one school plant to use as an elementary school and the other as a secondary school as such relief had not been considered by the trial court. In addition, the court held that petitioners were not entitled to a comprehensive judicial decree governing the operation of the "choice" plan as ordered by a different panel of the court in *Kelley* v. *Altheimer,* 378 F.2d 483 (8th Cir. 1967), and affirmed dismissal of the complaint.

A petition for rehearing *en banc* or by the panel, adverting to a conflict between panels of the court with respect to standards for approval of desegregation plans, was denied September 18, 1967.

REASONS FOR GRANTING THE WRIT

Introduction

The question here is whether in the mid-sixties, a full school generation after *Brown* v. *Board of Education,* a board which stubbornly refused to comply until threatened with loss of federal funds, may, with judicial approval, adopt a desegregation plan which perpetuates racially identifiable schools, although a practical, economical, and educationally superior alternative would disestablish the dual system. Similar issues are pending here in *Charles C. Green* v. *County School Board of New Kent County, Virginia,* No. 695, October Term, 1967, and *Brenda K. Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee,* No. 740, October Term, 1967. A second question, no less significant, is whether a district court and court of appeals may dismiss a complaint broadly challenging the constitutionality of desegregation policies and refuse to supervise the desegregation process because the

Board has adopted a plan facially approved by the United States Department of Health, Education, and Welfare.

In the Gould School District, as elsewhere, "free choice" has not achieved meaningful desegregation. Although the proportion of Negroes in all-Negro schools has declined since 1954, more Negro children are now attending such schools than in 1954.[5] Indeed, during the 1966-67 school year, 12 years after *Brown*, more than 90% of the almost 3 million Negro pupils in the 11 Southern states still attended schools over 95% Negro; 83.1% were in 100% Negro schools.[6] In this case approximately 85% of the Negro pupils in the system still attend schools with only Negroes. Desegregation has been a one-way street—a few Negroes moving into white schools, no whites attending Negro schools. "This June, the vast majority of Negro children in the south who entered the first grade in 1955, the year after the *Brown* decision, were graduated from high school without ever attending a single class with a single white student,"[7] a result plainly attributable to the prevalence of "choice" plans. The United States Civil Rights Commission in its most recent report stated:

> The review of desegregation under freedom of choice plans contained in this report, and that presented in last year's commission's survey of southern school

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[5] *Southern School Desegregation, 1966-67*, a Report of the U.S. Commission on Civil Rights, July 1967, p. 11.

[6] *Id.* at 165.

[7] *Id.* at 147. As the Fifth Circuit has had occasion to say "[f]or all but a handful of Negro members of the High School Class of 1966, this right [to a racially nondiscriminatory public school system] has been of such stuff as dreams are made on." *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 845 (5th Cir., 1966) *aff'd with modifications on rehearing en banc*, 380 F.2d 385 (1967) cert. den. *sub nom., Caddo Parish School Board* v. *United States*, —— U.S. —— (October 9, 1967).

> desegregation, show that the freedom of choice plan is inadequate in the great majority of cases as an instrument of disestablishing a dual school system. Such plans have not resulted in desegregation of Negro schools and therefore perpetuate one-half of the dual school system virtually intact. (Emphasis added.)[8]

By dismissing the complaint, the courts below totally refused to supervise the desegregation process, remitting Negro school children to a supposed remedy under Title VI of the Civil Rights Act of 1964. Such a disposition is unprecedented. It is particularly difficult to comprehend here because the H.E.W. Guidelines do not regulate the impact of construction policy or include specific standards to measure the effect of construction on "freedom" in a "freedom of choice" plan. The irony of the court of appeals deferral to H.E.W. is that in formulating desegregation standards the Department is guided by legal principles emanating from the courts.[9] For the Guidelines to develop in accordance with constitutional desegregation standards, the courts must continue to develop those standards with respect to central, but not heretofore considered, issues such as the impact of school construction policies on a desegregation plan and remedies appropriate to overcome institutionalization of segregation.

This petition is filed at a critical time in American education. Under the newly enacted Elementary and Secondary Education Act of 1965, 20 U.S. §241A, federal aid to the states for education is constituting an increasingly significant portion of the school budget. "In many cases

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[8] *Southern School Desegregation, 1966-67,* a Report of the U.S. Commission on Civil Rights, July, 1967, pp. 152-153.

[9] The Fifth Circuit recognized this in *United States* v. *Jefferson County Board of Education, supra,* at 372 F.2d 847, 851.

higher than 20% and in some cases higher than 30%." [10] These vast funds can either institutionalize segregation or operate as a force to eliminate it. Too often they have been a force for segregation. As the U.S. Commission on Civil Rights has reported:

> That Title I funds have been employed in such a manner as to institutionalize and strengthen the dual school structure is apparent when the use of such funds in the construction of new school facilities is examined. In at least one district, for example, school authorities used Title I funds to purchase portable classrooms for overcrowded Negro schools. In another district, Title I funds were used to build a vocational training shop midway between a white and a Negro school to be used separately by the children at each school. In still another district, Title I funds supplied one-third of the money to add separate gymnasiums to white and Negro schools which were 1,000 yards apart.[11]

This particular case, *Green* v. *County School Board of New Kent County, Virginia,* No. 695, October Term, 1967 and *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee,* No. 740, October Term, 1967, now pending before the court, do not involve the expenditure of ESEA funds, although in the instant suit the school board has been spending other federal grants. The causes arose before ESEA funds might have become an issue. But over years to come thousands of districts, probably including those mentioned above, will be receiving such monies with consequences that will tend to establish or disestablish

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[10] *Southern School Desegregation, 1966-67,* a Report of the U.S. Commission on Civil Rights, July, 1967, at p. 130.

[11] *Id.* at p. 136.

segregation as well as affect other aspects of the education process. The disposition of this case will be exceedingly important in such a development because this case involves standards which H.E.W. may impose on a district or from which it may relieve a district in the course of administering federal monies. This case, therefore, involves the relationship between this Court's interpretation of the Constitution and the administration of federal statutes implementing that interpretation, a matter of paramount importance.

The Court Below Erred in Dismissing the Complaint Without Further Inquiry Into the Feasibility of Grade Consolidation or Other Relief Which Would Disestablish Segregation.

A. By Dismissing the Complaint, the Courts Below Abdicated Their Responsibility Under *Brown* v. *Board of Education* to Supervise Disestablishment of the Segregated System.

Petitioners made a timely challenge to racially planned construction of new secondary school classrooms on the Negro school site. They did not challenge the replacement of a dilapidated Negro school generally but asked only that the construction, not scheduled to begin for over a year, take place on the white school site. Under a choice plan, to do otherwise would result in perpetuating an unmistakably identifiable Negro school. After the district court failed to enjoin the construction and a court reporter's illness delayed the appeal, the new building's outer shell was completed. In the court of appeals petitioners sought utilization of the dual plants as constructed in a maner which would disestablish the segregated system. The court ruled that it would not consider utilization of one plant for elementary students and the other

for secondary students because this relief was not sought in the trial court. It affirmed dismissal of the complaint.

We submit this is an ironic and unnecessary result which demonstrated a misconception by the court of its equitable powers and responsibility in a school desegregation case. Desegregation is by its nature a continuous process which requires continuing supervision by the lower courts. Records are always somewhat out of date and relief to be effective must be fashioned with flexibility. In the circumstances of this case, where completion of the construction merely altered the appropriate form of relief, dismissal of the complaint was abdication of jurisdiction over the desegregation process. See *Brown* v. *Board of Education*, 349 U.S. 294, 301 (1955); *Calhoun* v. *Latimer*, 377 U.S. 263 (1964); *Brooks* v. *School Board of Arlington County*, 324 F.2d 305 (4th Cir. 1963); *Smith* v. *Morrilton*, 365 F.2d 770, 783 (8th Cir. 1966); Cf. *Smith* v. *Hampton Training School*, 360 F.2d 577, 581 (4th Cir. 1966). As the court of appeals said in *United States* v. *Jefferson County Board of Education, supra* (380 F.2d at p. 389): "School desegregation cases involve more that a dispute between certain Negro children and certain schools. If Negroes are ever to enter the mainstream of American life as school children they must have equal educational opportunities with white children." The fact that petitioners' request for consideration of a grade consolidation plan had not been sought in the trial court does not justify dismissal of this case. The construction itself, and the failure of the Board to disestablish segregation, were the subject of timely attack in the district court. It was not feasible to raise the issue of consolidation because at the time the trial was held the new construction was not scheduled to begin for over a year. At the very least, the court of appeals was obligated to remand to the district court for a

hearing with instructions to order grade consolidation if not educationally impractical.

It is submitted that by dismissal of the complaint, at a time when segregation is entrenched, the panel failed to adhere to the rule of *Brown* v. *Board of Education*, 349 U.S. 294, 301 (1955) and numerous decisions of lower courts which hold that district courts must retain jurisdiction until a racially nondiscriminatory school system is a reality.[12] In *Brown*, federal courts were expressly directed to retain jurisdiction in order to supervise the enforcement of desegregation. Here, the court simply refused to be influenced by developments subsequent to trial even though their genesis, the construction program, was subject to timely attack.[13] The failure of the court of

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[12] See *e.g. Brooks* v. *School Board of Arlington County*, 324 F.2d 305 (4th Cir. 1963); *Buckner* v. *Board of Education*, 332 F.2d 452 (4th Cir. 1964); *Yarbrough* v. *Hulbert-West Memphis*, 380 F.2d 962 (8th Cir. 1967).

[13] In the second *Brown* decision this Court directed that "in fashioning and effectuating the decrees, the courts will be guided by equitable principles." (349 U.S. at 300). Equity courts have broad power to mold their remedies and adapt relief to the circumstances and needs of particular cases as graphically demonstrated by the construction given to 15 U.S.C. §4 in restraining violations of the Sherman Antitrust Act. The test of the propriety of such measures is whether remedial action reasonably tends to dissipate the effects of the condemned actions and to prevent their continuance, *United States* v. *National Lead Co.*, 332 U.S. 319 (1947). Where a corporation has acquired unlawful monopoly power which would continue to operate as long as the corporation retained its present form, effectuation of the Act has been held even to require the complete dissolution of the corporation. *United States* v. *Standard Oil Co.*, 221 U.S. 1 (1910); *Schine Chain Theatres* v. *United States*, 334 U.S. 110 (1948). Numerous decisions establish that the federal courts construe their power and duties in the supervision of the disestablishment of state imposed segregation to require as effective relief as in the antitrust area. So in *Griffin* v. *School Board of Prince Edward County, Va.*, 377 U.S. 218 (1964) this Court ordered a public school system which had been closed to avoid desegregation to be reopened. *Carr* v. *Montgomery County (Ala.) Board of Education*, 253 F. Supp. 306 (M.D. Ala. 1966), ordered twenty-one (21) small inadequate segregated schools to be closed over a two

appeals to remand to the district court with instructions to order consolidation, if feasible, demonstrates a too narrow view of the power and duties of a federal court of equity in supervising desegregation and granting relief required by the Constitution.[14] At one point in its opinion the court of appeals states that the parties had no opportunity to offer evidence on the feasibility of consolidation and the trial court had no opportunity to pass on the issue. If the defect was solely one of evidence, however, the proper remedy was remand to the district court for further proceedings, not dismissal.

Other portions of the panel's opinion suggest, however, that it affirmed dismissal of the complaint for quite different, although also erroneous, reasons:

> Moreover, there is no showing that the Field facilities with the new construction added could not be con-

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year period and the students reassigned to larger integrated schools. *Dowell* v. *School Board of Oklahoma City*, 244 F. Supp. 971 (W.D. Okla., 1965), aff'd 375 F.2d 158 (10th Cir., 1967), cert. den. 387 U.S. 931 (1967), ordered the attendance areas of pairs of six-year junior-senior high schools in adjacent neighborhoods consolidated, with one school in each pair to become the junior high school and the other to become the senior high school for the whole consolidated area. The Fifth Circuit has held that a district court has power to enjoin "approving budgets, making funds available, approving employment contracts and construction programs . . . designed to perpetuate, maintain or support a school system operated on a racially segregated basis." *Board of Public Instruction of Duval Co., Fla.* v. *Braxton*, 326 F.2d 616, 620 (5th Cir., 1964). The Fourth Circuit has held that a school construction program an appropriate matter for court consideration in spite of the possible complexities involved. *Wheeler* v. *Durham City Board of Education*, 346 F.2d 768 (4th Cir., 1965).

[14] The continuous nature of the desegregation process has consistently obligated appellate courts to fashion relief despite the occurrence of events subsequent to judgment in the district court. Such has been the common practice of the courts applying *Brown* and indeed it had been the practice of the Eighth Circuit until this case. *Calhoun* v. *Latimer*, 377 U.S. 263 (1964); *Smith* v. *Morrilton*, 365 F.2d 770 (8th Cir. 1966).

> verted at a reasonable cost into a completely integrated grade school or into a completely integrated high school *when the appropriate time for such course arrives.* (Emphasis supplied.) Appendix, infra, p. 20a.

Utilization of one school as elementary and one as secondary school is thus acceptable to the court of appeals but only "when the appropriate time for such course arrives." Such language strongly implies that it is a notion of deliberate speed which led the court to reject grade consolidation and approve a choice plan and not solely that petitioners did not seek in the trial court altered utilization of classrooms which were not even constructed at the time of trial. But the time for deliberate speed is over. Over two years ago this Court stated, "more than a decade has passed since we directed desegregation of public school facilities with all deliberate speed. . . . Delays in desegregating school systems are no longer tolerable." *Bradley* v. *School Board of the City of Richmond,* 382 U.S. 103, 105 (1965). In 1964, the Court said: "There has been entirely too much deliberation and not enough speed. . . ." *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 229. The Court should grant certiorari in this case to make it clear that "the appropriate time" is now.

By their opinions and dispositions the courts below indicated that they regard the United States Department of Health, Education, and Welfare as having controlling responsibility for supervising school desegregation in Gould despite the fact that H.E.W. Guidelines do not deal with the impact of construction policy on a "freedom of choice" plan, that H.E.W. had not required modification of the construction plan or in any way sought to ameliorate its impact. To be sure H.E.W. Guidelines are entitled to substantial weight as general propositions of school desegregation law, and as minimum standards for court-ordered

desegregation plans. The same cannot be said for H.E.W. administrative approval of a particular school district's actual compliance with constitutional standards. With its limited personnel and funds, the Department is simply unable to ascertain all of the relevant facts about the performance of an individual school district in the way that a court hearing can, especially where, as here, H.E.W. Guidelines do not even purport to regulate the effect of construction policy. H.E.W.'s "compliance reviews and enforcement proceedings" are "not planned in a rational and consistent manner"; the Department's appraisal of desegregation sometimes cannot be but "faulty and inefficient." "Manpower limitations" force the Department to fail to proceed against many districts which are not in compliance. See *Southern School Desegregation,* 1966-67, A Report of the U. S. Civil Rights Commission, July, 1967, pp. 58, 59. Compare *Cypress* v. *Non-sectarian Hospital Association,* 375 F.2d 648, 658, 659 (4th Cir. 1967) where a hospital defended a desegregation suit on grounds of H.E.W. approval, but the court ruled that H.E.W.'s compliance mechanism was so inefficient that it was not an equitable defense to a suit based on deprivation of constitutional rights. Unfortunately, the sorry statistics of southern school desegregation, see *supra* p. 12, reflect the inability of the Department to police, effectively, compliance with the Guidelines.

Petitioners complained, moreover, of a violation of their constitutional rights; not statutory rights such as they may have under Title VI of the Civil Rights Act which regulates the relationship between the federal government and its grantees. The courts may not abdicate their responsibility to construe the performance of school boards in terms of the constitutional standards of the Fourteenth Amendment. Petitioners have been unable to locate any

decision which holds to the contrary. In this regard, the court below fundamentally misconstrued the role of burden of proof in school desegregation cases. The burden of proof is not on plaintiffs to demonstrate that a school system which undisputedly has been segregated for generations is still segregated, but on the school board to demonstrate that its desegregation plan desegregates the system. *Brown* v. *Board of Education, supra.* That burden is not carried by adoption of a "freedom of choice" plan when another plan which apparently is reasonable and possible will immediately desegregate the system.

B. "Freedom of Choice" Is Incapable of Disestablishing Segregation in the Gould School District.

The fundamental premise of *Brown* v. *Board of Education* was that segregation in public education had very deep and long term effects upon Negroes who were segregated. It is not surprising that individuals, reared in that system and schooled in the ways of subservience (by segregation in schools and every other conceivable aspect of existence) who are given the opportunity to "make a choice," chose, by inaction, that their children remain in Negro schools.[15] By making the Negro's exercise of choice the critical factor, school authorities virtually insure desegregation's failure. Moreover, intimidation, a weapon

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[15] In its *Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964* (referred to as the Guidelines), the Department of Health, Education, and Welfare states (45 CFR Part 181.54):

> A free choice plan tends to place the burden of desegregation on Negro or other minority group students and their parents. Even when school authorities undertake good faith efforts to assure its fair operation, *the very nature of a free choice plan and the effect of long-standing community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students.* (Emphasis added.)

well-known throughout the south, has been employed to deter transfers. Every community pressure militates against the affirmative choice of white schools by Negro parents. Here the heavy hand of segregation did its work in overt fashion.

First, "The only school desegregation plan that meets constitutional standards is one that works" (United States v. *Jefferson County Board of Education, supra,* 372 F.2d at p. 847 (emphasis in original)) and the Gould plan has not worked. In both first and second year of its operation only about 70 Negro pupils attended the white school and no whites "chose" to attend the Negro school. In the first year of the plan several Negroes "chose" the white school but were refused admission due to overcrowding, an overcrowding caused in part by the fact that no whites "chose" to attend the Negro school. Only one teacher has been assigned to a desegregated faculty, and that teacher on a part time basis. In June, 1967, the superintendent informed the Department of Health, Education and Welfare that he anticipated an increase of only 14 Negro students in the white school for the 1967-68 school year, the third year of desegregation and that again no whites would attend the Negro school. No Negro teacher would be assigned to teach at the white school; one white teacher and one white supervisor would have part time duties at the Negro school, see note 1, *supra.* In short, in over two years of operation "freedom of choice" has not and does not appear capable of disestablishing segregation.

Second, the record shows active intimidation of the Negro community. The PTA of the Negro school was prohibited by the superintendent from meeting at the school once it began to protest conditions there, and an injunction was obtained by the board of education against public protests concerning school conditions (R. 63-64).

Third, the degree of inequality between the Negro and white high schools which has been maintained for so long inevitably communicates to the Negro community that the Board could not be trusted to administer a "freedom of choice" plan fairly, see *supra* pp. 6-8. Until 1965, the Negro high school had such a poor physical plant and program that it was completely unaccredited by the State of Arkansas, while the white high school had an "A" rating (R. 10, 16, 31, 83, 130). Long promised reconstruction took place only after adoption of a "freedom of choice" desegregation plan when a new school would have the possible effect of limiting the number of Negro transferees under the choice plan. Not only has the practice of segregation followed by this district been unconstitutional since 1954, *Brown* v. *Board of Education,* 347 U.S. 483, but the "gross inferiority" of the separate public school facilities provided for Negro students has been unconstitutional at least since 1938, *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337; *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950). The court of appeals erred fundamentally, in ignoring the relevance of these historic inequalities to the validity of the choice plan.

Fourth, the character of the new replacement construction on the traditional segregated site (and that no rational educational purpose is apparent behind such dual construction) is not susceptible to any other interpretation by the community, Negro *and* white, than that the Board wishes to maintain a segregated system, with one school intended for whites and the other intended for Negroes, see *Kelley* v. *Altheimer,* 378 F.2d 483, 490, 496 (8th Cir. 1967). This was just as unambiguous an act as re-writing the word "white" over the door of the Gould School and the word "Negro" over the door of the Field School—and

is just as coercive to the Negroes who have traditionally been informed by the segregated system that they were not wanted in "white" institutions, and to whites who have been informed that it was not proper for them to be in "Negro" institutions. The replacement construction here has precisely the same effect on the "freedom" in a "freedom of choice" plan as does the maintenance of all-white and all-Negro faculties at various schools in a system. *Cf. Bradley* v. *School Board of the City of Richmond,* 382 U.S. 103 (1965); *Kier* v. *County School Board of Augusta Co., Va.,* 249 F. Supp. 239, 246 (W.D. Va., 1966).

Fifth. The integration of faculty is a factor absolutely fundamental to the success of a desegregation plan, for a school with a Negro or white faculty will always be a Negro or white school. Nevertheless, the Board has assigned no Negro teachers to regular teaching at the traditionally white school, and only two whites to limited, non-teaching, duties at the traditionally and still all-Negro school (R. 67-70; see note 1, *supra*). There are no plans for substantial desegregation in the future (R. 68-69).[16] Compare *Kelley* v. *Altheimer,* 378 F.2d 483, 491 (1967).

The duty of the School Board was to convert the dual school system it had created into a "unitary non-racial system." Although it had an alternative which would have disestablished the dual system more speedily and with less educational inefficiency, the Board chose a method whose success depended on the ability of Negroes to unshackle themselves from the psychological effects of the dual system of the past, and to withstand the fear and intimidation

[16] The failure of the Board to take meaningful steps to integrate its faculty is consistent with what the record shows: that the Board, by adopting freedom of choice, could not in good faith have believed or intended that the dual system would thereby be converted into the nonracial system required by the Constitution.

of the present and future. Only a "freedom of choice" plan subjects Negroes to the possibility of intimidation or gives undue weight to the very psychological effects of the dual system that this Court found unconstitutional in *Brown* v. *Board of Education*. Nor did the Board introduce evidence to justify adoption of a method, which if it could disestablish the dual system at all, would require a much longer period of time in the method petitioners urge. The failure of the Board to show, by clear and convincing evidence, the existence of such administrative reasons as this Court contemplated in *Brown II* might justify delay, made it error for the courts below to abdicate totally to an administratively supervised "freedom of choice" plan and refuse to place the Board under the restraint of a court order.

C. Use of One School for Elementary Grades and the Other for Secondary Grades Is a Reasonable Alternative to "Freedom of Choice" Which Will Disestablish the Dual System.

Because of the very simple configuration of this small district, there is a clear-cut choice between a system composed of one reasonably-sized integrated elementary school and one reasonably-sized integrated secondary school, or a system composed of two inefficiently-small, combination elementary and secondary schools. The superintendent's concession that the replaced Negro school would continue to be all-Negro (R. 67) as well as the obvious educational inefficiency and undesirability of the dual schools provides a reasonable basis for providing that one site shall be used for an elementary school and the other site for a secondary school. The system's school buildings as constructed are adaptable to changed usages and whatever additional cost might be involved in alteration, as the court of appeals recognized, appendix, *infra*, p. 20a, can be more than bal-

anced against the continued extra operating cost of the inefficient dual system.

The court of appeals failed to order grade consolidation because of the time when such relief was sought, a ruling which is discussed fully, *supra* pp. 15-19. For this reason, however, we believe that the proper course for this Court to follow is to remand to the district court for a determination of the feasibility of consolidation with instructons to order such relief if not impractical. We, therefore, restrict ourselves in this section of the petition to a brief showing that such utilization is shown by this record to be a sufficiently workable and attractive method of administering the system for the lower courts to be required to consider it on the merits. See *e.g. Calhoun* v. *Latimer*, 377 U.S. 263 (1964).

The school facilities of the district ideally lend themselves to a plan of consolidation. The traditionally white Gould High School is the most modern facility in the district, having been completed in 1964 (R. 89). The immediately adjacent Gould Elementary School was originally constructed for use as a high school, and was subsequently converted to an elementary school (R. 81-82). If the Gould Elementary School were converted back to use as a secondary school, the Gould site would be clearly suitable for all the secondary students in the district. The 1966-67 secondary enrollment of the district was 360 for grades 8-12, while the total enrollment at the Gould School was 375 (grades 1-12).[17]

The all-Negro Field Elementary School is also a modern facility, constructed in 1954 with subsequent additions (R. 89-91). The gymnasium is adequate for both the present

[17] See footnote 1, *supra*.

number of Negro elementary and Negro high school students, so that it would also be suitable for use by all of the elementary students in the system. The new building constructed by the system for use as the Negro high school is adjacent to the Field Elementary School, and can easily be furnished as an addition to the elementary school—which would make the combined Field School adequate for all of the elementary students in the district. The enrollment for the district in 1966-67 was 492 for grades 1-7, while the total enrollment at the Field School was 477 (grades 1-12).[18]

Unless the Board is required to cease maintaining dual facilities, not only will a predominantly segregated school system be fastened upon the community for at least another generation, but all students—Negro and white—will continue to pay the price of the inefficiency caused by operating a dual system in such a small district. This is graphically illustrated by the disparity in course offerings at the two high schools. If all students were attending the same high school, everyone would have the opportunity to take courses such as journalism or agriculture, as well as other courses which would be available because a higher total of students would elect them. Negroes who presently have no football, basketball or track programs would be able to participate in those sports. The basic sciences, chemistry and biology, are offered only in alternate years at Gould while they are offered every year at Field. There is no Future Farmers of America Program at Field because there is no agriculture course. In a consolidated system, all students would have the opportunity to take each of these courses every year.

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[18] *Ibid.*

The sad fact is that the Board's failure to consider grade consolidation not only perpetuates segregation but deprives both Negroes and whites of significant educational opportunities. It is no accident that the most important study of secondary education that has been made in this country, James Bryant Conant's, *The American High School Today* (1959) gives highest priority in educational planning to the elimination of small high schools with graduating classes of less than one hundred.[19] See *Moses* v. *Washington Parish School Board*, — F. Supp. — No. 15973, E.D. La. ("Free choice" plan "wasteful in every respect"; geographic zones ordered).

The court of appeals recognized that there is substantial evidence that consolidation is a feasible alternative to freedom of choice when it found that "there is no showing that the Field facilities with the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school *when the appropriate time for such a course arrives*" (emphasis supplied), appendix, *infra*, p. 20a. Given the apparent feasibility of grade consolidation, the deficiencies of a "choice" plan in this district, and the fact that petitioners could not have explicitly sought consolidation in the trial court because the hearing took place long

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[19] "The enrollment of many American public high schools is too small to allow a diversified curriculum except at exorbitant expense . . . 'The prevalence of such high schools—those with graduating classes of less than one hundred students—constitutes one of the serious obstacles to good secondary education throughout most of the United States. I believe such schools are not in a position to provide a satisfactory education for any group of their students—the academically talented, the vocationally oriented, or the slow reader. The instructional program is neither sufficinetly broad nor sufficiently challenging. A small high school cannot by its very nature offer a comprehensive curriculum. Furthermore, such a school uses uneconomically the time and efforts of administrators, teachers, and specialists, the shortage of whom is a serious national problem" (p. 76).

before construction of new classrooms began, the court of appeals had an obligation to fashion a remedy equal to the task of disestablishing the dual structure. Instead, it erroneously affirmed dismissal of the complaint.

D. As Minimum Compliance With *Brown* v. *Board of Education* Petitioners Are Entitled to a Comprehensive Decree Governing the Desegregation Process.

As alternative relief, petitioners asked the court of appeals to issue a comprehensive decree governing the desegregation process similar to that imposed by another panel of the circuit in *Kelley* v. *Altheimer*, 378 F.2d 483 (8th Cir. 1967), and by the Fifth Circuit in *United States* v. *Jefferson County Board of Education, supra.* The court did not detail its reasons for refusing to grant this relief but only stated:

> Unlike the Altheimer situation, no attack has been made in the pleadings on the desegregation plan adopted by the Board. Additionally, we find no substantial evidence to support a finding that the Board was not proceeding to carry out the plan in good faith. (Appendix, *infra*, p. 24a)

If the failure of the court of appeals to subject the Board to a comprehensive decree, rather than dismissing the complaint, rests on whether an attack had been made on the plan in the trial court, it rests on a finding which is clearly erroneous. The complaint sought to enjoin the Board from compelling any Negroes to attend the all-Negro school (relief fundamentally inconsistent with the "choice" plan) and also sought to enjoin the "operating of a segregated school system" (R. 8). The trial is replete with testimony concerning the operation of the plan (R. 53-63, 67-71, 75, 95, 96, 101, 102, 109, 117, 118, 121-23) and the

district court refused to enjoin the Board from maintaining a segregated system as prayed only because he found the plan adequate (R. 14).

To the extent the second reason given by the court—that the Board was proceeding to carry out the plan in good faith—supports the court's conclusion that the complaint should be dismissed, it reflects a misconception of the role of lower courts in supervising the desegregation process, see *supra*, pp. 16-19). This petition describes administration of the Gould system in detail sufficient to show that whether the Board is acting in good faith or not, its performance is not such as to permit the lower courts to avoid supervision of the desegregation process.

In *United States* v. *Jefferson County, supra,* and in *Kelley* v. *Altheimer, supra,* the courts found that the policies and practices of the school boards had been designed to perpetuate segregation and for that reason, and to insure the continuity and speed of desegregation, ordered that any plan submitted by the boards would have to conform to certain principles as to student and faculty desegregation, transportation, school equalization and other areas touching on desegregation. At the very least, on the basis of the record in this case, petitioners were entitled to a retention of jurisdiction and entry of a comprehensive decree by the district court.

The finding of the Fifth Circuit in *Jefferson* that "case by case development of the law is a poor sort of medium for reasonably prompt and uniform desegregation" (372 F.2d at pp. 854-55) is undisputable. A comprehensive and uniform decree, therefore, provides invaluable assistance to district courts in fulfilling their responsibility to require the reorganization of segregated school systems under *Brown*. Such a decree provides a distillation of the ex-

perience in formulating desegregation standards of the courts, the Executive branch, educators and administrators. When adopted uniformly such a decree also avoids totally different rates of desegregation in communities which are similarly situated. It provides Negroes with a definite understanding of what they can expect, and district courts with what they must require, from school authorities. It insures that desegregation plans will encompass the minimum range of administration and planning functions which must be reorganized if the unlawful segregated system is to be disestablished.

This litigation should not have been necessary. At a minimum, the Negroes represented by petitioners are entitled to judicial supervision of desegregation where administrative supervision has not proved adequate as well as to a clear statement of the essential features which the plan must encompass. Only in this way will there be removed the "obstacles" to enjoyment of the right to an equal and desegregated education guaranteed by the Fourteenth Amendment—"obstacles" which this Court recognized must be destroyed thirteen years ago.

CONCLUSION

WHEREFORE, petitioners pray that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion of United States District Court

(Filed April 26, 1966)

The plaintiffs in this case are Negro children who are pupils in grades five, ten and eleven in the Public School System of Gould, Arkansas. This action was brought by their parents and next friends and is a class action seeking an injunction enjoining the Board of Education of the Gould School District from (1) requiring the minor plaintiffs and all others similarly situated to attend the all-Negro Field School for the 1965-66 school term, (2) providing public school facilities for Negro pupils in Gould, Arkansas, which are inferior to those provided for white pupils, (3) expending any funds for operation or improvement of the predominantly white Gould Public Schools until and unless the Field School is made substantially equal in facilities, equipment, curriculum, advantages, etc. to the predominantly white Gould Schools, (4) building any new facilities to replace Field High School at any location other than on or adjacent to the grounds of the Gould Public Schools, and from (5) otherwise operating a racially segregated school system.

The defendant school board claims that it is doing everything possible to correct the very things plaintiffs are complaining of and that no injunction is required or warranted, therefore the case should be dismissed.

The Gould School District encompasses about eighty square miles of agricultural land in Lincoln County in Southeast Arkansas. Almost 20,000 acres of this land is tax exempt because the Arkansas State Penitentiary is located within the district. It is a rural and agricultural

area. There are no significant industries within the district, and Gould, with a population of 1,210, is the district's only incorporated town. In the 1964-65 school year the district derived $56,530 from its millage levy on the assessed value of the real and personal property in the district and most of the rest of its budget of over $200,000 was received from various programs of the State and Federal Government. It is obvious from these facts and from other testimony given at the hearing of this case that this school district is a financially poor one.

The population of the district of about 3,000 consists of 1,800 Negroes and 1,200 white people. There are approximately 880 students in the system and 580 of these are Negro. Prior to 1965 the school board operated two school systems from grade one through twelve on a racially segregated basis. The Field Elementary School and the Field High School were attended by Negro children only. The Gould Elementary School and the Gould High School had only white students. In the spring of 1965 the defendant school board unanimously voted to accept a desegregation plan which provided for the integration of all twelve grades of the system in the 1965-66 school year in accordance with a "Freedom of Choice" plan.[1]

After the students and their parents had expressed their choice of schools it appeared that there would be overcrowding in the Gould Schools in grades five, ten, and eleven. The school authorities discussed the problem with the appropriate authorities of the Department of Health, Education and Welfare and it was agreed that it would be

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NOTE 1: The "Freedom of Choice" plan in this case is of the same type that the Court of Appeals for the Eighth Circuit indicated it would approve in Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965), therefore it is unnecessary to explain the details of the plan in this opinion.

better for the school to postpone the granting of the freedom of choice in these grades for one year. However, as many Negro children in these three grades as possible who chose the previously all-white school were accepted in that school on the basis of geographical proximity of their home to the school. The plan as amended was approved by the federal agency.

In other words, all students in the district were accepted in the school of their choice except in the fifth, tenth, and eleventh grades. In these grades some forty Negro pupils expressed a preference to attend the Gould Schools and twelve of them were accepted. The remaining students were assigned to the Field Schools, and it is this group that is represented by the plaintiffs in this case.

At the trial plaintiffs offered testimony concerning alleged discrimination within the district which they contend this Court should correct by use of its injunctive powers.

One of plaintiffs' contentions is that the Court should enjoin the defendant school board from maintaining a racially segregated school system. But the testimony discloses that the school board is no longer maintaining such a system. The desegregation plan which it has adopted and which has been approved by the Department of Health, Education and Welfare has brought about more than token integration even though it has been in operation only one year. There are 71 Negro students and 298 white students attending the previously all-white school and there will undoubtedly be more Negro students in this school next year. The Negro students are participating on the school athletic teams and taking part in several other extra-curricular activities at the school. Furthermore, in the school term beginning September 1966 it is

the plan of the district to honor the preference of all children in the three grades to which the Choice plan was only partially applicable this year.

Another contention of the plaintiffs is that the school board is discriminating against Negroes by paying Negro teachers salaries lower than those paid to white teachers. The testimony revealed that the base salary paid to Negro teachers is $3,870, while the base salary for white teachers is $4,050.00. The range of salaries for Negro teachers is from $3,870.00 to $4,500.00, and the range for white teachers is $4,050.00 to $5,580.00. The superintendent of the schools testified that he was well aware of the differences in salaries paid to the teachers of different races, and he said that the historical reason for this difference was simply the law of supply and demand. Because of the larger supply of Negro teachers he was able to hire them at lower salaries than those demanded by white teachers. He stated that five years ago, when he was first employed by the school system, the difference in the base salaries was $600. In the last five years the difference has been lowered to $180. The reason the salaries cannot be equalized before next year is purely a financial one. The budget for the 1965-66 school year is practically exhausted and there are no funds available for this or any other purpose.[2] In the course of his testimony, the superintendent assured the Court that the salaries for Negro and white teachers for the 1966-67 school year would be equal.

The primary complaint of the plaintiffs is that they are being discriminated against because the Field Schools to which they have been assigned are grossly inferior to the

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NOTE 2: The total received for all school purposes this year was $225,000. The budget expenditure is $221,000. This is a typical year. The surplus remaining from last year was $1,200.

Gould Public Schools. They show the inferiority of the Fields Schools by citing several examples. Some of these are: (1) the Field High School is a frame building erected in 1924 which is in a poor state of repair, with holes in the floor and cracks in the wall, while the Gould High School is located in a brick and concrete block building only two years old; (2) the Gould High School has an "A" rating from the Arkansas Department of Education, while the Field High School is unaccredited; (3) the restroom facilities at the Field High School are located in a separate building, causing students to walk outdoors to reach the restroom, while at the Gould High School the restroom facilities are located in the school building itself; (4) the Field High School is heated with upright gas heaters, while the Gould Schools are heated with central heat; (5) the science laboratory facilities at Field High School are inferior to those at Gould High School; (6) the library facilities at Field High are very poor, with few books and no full-time librarian, while the Gould School library contains almost 1,000 books and has a librarian; (7) there is no hot lunch program at the Field Schols, while the Gould Schools have an air-conditioned cafetorium; and, finally (8) courses in journalism and agriculture are not offered at the Field High School, while they are taught at the Gould High School.

The defendant admits that facilities at the Field High School are inferior to those at the Gould Schools, that the situation is a bad one, and that a new school building is needed. It claims that there are no funds available at the present time with which to build such a school and that the school district does not have sufficient borrowing power to secure enough money for such a project. To borrow that

much money the school district would need a new bond issue, but since the present millage is at 47 (the maximum allowable under State law),[3] new millage cannot be added to finance such a bond issue. However, one of the present outstanding bond issues will be paid off by January of 1967, and the nine mills used to finance that issue can be transferred to a new issue. The money obtained through this new bond issue has long been earmarked by the board for the construction of a modern facility to replace Field High School. Therefore, it appears that the defendant school board realizes the need for a new school building and is doing all that it is financially able to do toward filling this need.

On the other hand, the defendant does not admit the degree of inequality between the schools is as great as plaintiffs claim. They contend that although the Field High School building is in very poor condition and is inferior to the Gould High School building, the same is not true for the rest of the buildings in the Field School System. The evidence shows that in the last fifteen years, or at lease since 1954, over seventy-five per cent of all money available for construction has been spent on the Negro schools. In fact, the total building expenditures for the Negro schools since 1954 are in excess of $138,000. On the other hand, the only money spent on capital improvements at the Gould School was from proceeds of an insurance policy when the school building burned late in 1963. The new building was built entirely with the funds from this

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NOTE 3: Under Arkansas law a school district may not issue bonds in an amount in excess of 15% of the district's assessed valuation of property located within the district. Gould has reached that limit.

insurance policy.[4] The Field Elementary School is a modern brick and concrete block building built in 1954 with classrooms added as late as 1965. The gymnasium for the Field Elementary and High Schools is a modern concrete block building with excellent restroom, dressing room, and shower facilities, as well as a fine gymnasium and auditorium. The gymnasium at the Gould School is an old frame building in poor repair, with inadequate and unsightly dressing room and restroom facilities. The home economics buildings at both the schools are old buildings which the citizens of the school district have helped repair and decorate, and which are of approximately the same quality. Although it was never definitely established just what scientific laboratory facilities the Field High School has, it is evident from the testimony that they are inadequate and practically nonexistent. However, the laboratory facilities at the Gould High School would hardly be considered adequate or satisfactory. The laboratory is located in an old concrete block building that was once used as a barbeque house. For most of the experiments there is only enough equipment for the teacher to use at a demonstration desk and sink. According to the evidence, no building on either campus is heated by central heat, and in the last two years the same amount of money has been allocated to each of the libraries. The defendant admits that the Field Schools do not have a hot lunch program or an agriculture department but claims that federal aid is being sought, and the superintendent of schools assured the Court that both programs would be established

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NOTE 4: A Teacherage, consisting of two cottages for occupany by teachers, was constructed on the Field campus a year or two ago. This was financed locally, and the monthly payments to pay the loan come from rent paid by the teachers.

in the Field Schools by the end of this year. Defendant also states that the reason some courses such as journalism are taught in Gould School and not in Field School is that they are elective courses and are not taught unless there is a sufficient demand for them. Therefore the defendant claims that although conditions at the Field High School are poor, there is not a large degree of inequality between the two school systems.

During the course of the hearing on this matter, after the defendant had admitted the inferiority of the Field High School and had set forth its proposal for building a new facility, plaintiffs moved in open court to amend their petition for an injunction to include enjoining the defendant from building any new facilities to replace Field High School at any location other than on or adjacent to the grounds of the Gould Public Schools. This, it is believed, is the only real issue remaining in the case. The Court granted the motion, and evidence was heard on both sides of this question. The Court also asked counsel for briefs on the question of whether or not the Court could or should order the school district to build its proposed new facilities at any particular location.

It is plaintiff's contention that the building of a new high school at the site of the old Field High School or on the Field Elementary School grounds would promote and encourage segregation in the school system. Plaintiffs contend that if the new high school was built at one of these locations, only Negro pupils would request that they be assigned there. Plaintiffs also say that in fact this is the intention of the school board. They point out that at the hearing the superintendent of schools stated that probably only Negro children would select the new high school and plaintiff argues that this shows that it is

the school board's intention to create a "Negro high school" and not just another high school for the district. Plaintiffs argues that it is a breach of plaintiffs' constitutional rights to allow defendant school board to carry out a construction program which is designed to bring about or further segregation in the school system.

Plaintiffs also contend that it would be unsound for a school district in the financial condition of the Gould School District to maintain separate school facilities for Negro children. Such a plan would entail considerable duplication and would dilute the quality of education which could be offered to both white and Negro students by a school district of this size.

The defendant contends that the management or administration of the schools has been committed to local school officials and is not within the province of the Court and that selection of the location of a new school facility is an administrative or managerial decision which should be left to those officials whose duty is to determine what is best educationally and administratively for the school system. The defendant claims that there are several reasons why it is unsound to locate the new high school at the site insisted upon by plaintiffs and which support the board's selection of a site adjacent to the Field Elementary School. These facts are (1) that the school district already owns enough land at the Field Elementary School to accommodate the new high school building, (2) the district does not own sufficient land at the site of the Gould High School for this purpose, (3) additional land near the Gould High School is not for sale and would have to be acquired by condemnation at a high price since it is being subdivided into residential lots, (4) the new gymnasium (which has been referred to above) was

built on the grounds of the Field Elementary School to accommodate both elementary and high school students in anticipation of the location of the new high school on that campus, (5) that the location of the schools in opposite ends of town and on opposite sides of a heavily traveled U. S. highway is desirable for the safety of the children and for obtaining the educationally advantageous concept of "neighborhood schools."

The question before the Court is actually two pronged. First, is this Court authorized to tell the school board where to build or not to build a new school building, and second, should the Court do so under the circumstances in this case? These questions are of first instance before this Court, and in fact there is very little authority from any jurisdiction.

In the "landmark" civil rights cases concerning school integration the courts leave no doubt that segregation is and must be a thing of the past. They tell the courts that there can no longer be "Negro schools" and "White schools" and that the courts cannot permit a state to support "segregated schools through any arrangement, management, funds or property. . . ." *Cooper* v. *Aaron*, 358 U.S. 1. In a general way these cases give this and all district courts the authority to take what steps are necessary to insure that there is an end to segregation in our schools.

At the same time these cases also contain language which seems to recognize a limit to the courts' authorization to deal in school affairs. In *Brown* v. *Board of Education of Topeka*, 349 U.S. 294, the court said:

> "school authorities have the primary responsibility for elucidating, assessing, and solving these problems;

courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."

In *Briggs* v. *Elliot,* 132 F.Supp. 776, 777 (E.D. S.Car. 1955), a three-judge district court interpreting *Brown* said,

"Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the state."

And this Court in *Aaron* v. *Cooper,* 164 F.Supp. 325, 334 (1959) stated:

"It is not the duty or function of the Federal Court to regulate or take over and operate the public schools. That is still the duty of the duly state-created school authorities."

These cases make it apparent that there is a limit to the court's authority to deal in school matters, although they do not say what that limit is.

In *Board of Public Instruction of Duval County, Fla.* v. *Braxton,* 326 F.2d 616 (1964), the Court of Appeals for the Fifth Circuit approved an injunction issued by Judge Simpson of the District Court for the Middle District of Florida in which the school authorities were enjoined from operating a compulsory biracial school system, maintaining dual attendance areas, assigning pupils and teachers on the basis of color, and from

"Approving budgets, making available funds, approving employment contracts and construction programs,

> and approving policies, curricula and programs designed to perpetuate, maintain or support a school system operated on a racially segregated basis."

Although that injunction does not go as far as plaintiffs have asked for in this case, it does go further into the realm of school administration than any other court has gone. Perhaps some of the factors that the case dealt with should be pointed out in that they may limit the scope of the decision.

In that case the court was dealing with a school system that, some eight years after the second *Brown* decision, had done nothing toward bringing an end to segregation. In fact, the board was still maintaining and planning to continue to maintain separate systems for colored and white children with dual attendance areas. The court, of course, was trying to enjoin *all* this type action. Therefore it did enjoin all the policies of the board including its future construction policies which were "designed to perpetuate, maintain or support a school system operated on a racially segregated basis."

In June of 1965 this Court in *Yarbrough* v. *Hulbert-West Memphis School Dist. No. 4*, 243 F. Supp. 65, 71, said:

> ". . . the basic responsibility and authority for operating the schools in a constitutional manner rest upon school boards and school authorities rather than the courts. The question is not what the court would do if it were operating the schools, but whether the defendants are proceeding in a permissible manner from a constitutional standpoint."

This still seems to be the better or most well reasoned role for the court. It should be an ameliorative or corrective

body rather than an initiating or policy-making one. Once the school board has made a decision to take a certain action in the administration of the schools, then it becomes the Court's duty to determine whether or not this action is constitutional.

However, this Court is not prepared to state that there might not be circumstances under which the Court would be justified in taking action such as that the plaintiff is asking for in this case. Assuming without deciding that this is an area of school policy-making which the court could enter to protect the civil rights of the school district's citizens, this Court does not feel that the circumstances of this case merit such action.

Here the school board has begun a desegregation program for all twelve grades without having been ordered to do so by a court. The delay in the program for the three grades involved in this case is temporary and future plans call for complete integration. The fact that the Negro children who are attending the previously all-white schools are participating in the school's curricular and extra-curricular activities seems to indicate that this plan is more than a pretense or sham to meet the minimum requirements of the law.

The availability of campus area in one place and not the other, the lack of funds to procure more land, and the necessity of locating the new high school near the existing gymnasium designed to accommodate the high school students are all valid reasons for the administration's decision as to the location of the new high school. There is no reason to assume that only Negro students will attend the new high school. In fact, it is a virtual certainty with the progress of integration, building space limitations alone will insure that the new school will be integrated.

Certainly these reasons, coupled with the school board's recent initiative toward integrating the schools, do not indicate that the board's plans are solely motivated by a desire to perpetuate or maintain or support segregation in the school system. Therefore, the Court will not usurp the normal managerial prerogative of the school board to the extent of determining where the new building will be located.

CONCLUSION

Practically all of the questions or problems in this case stem from one major source—the school district has a serious lack of funds. The main problem, of course, is the inferiority of the Field High School. However, if the Court ordered the school board to build a new facility tomorrow the board would be powerless to act. It simply does not have the money to do so. It is obviously not the purpose of an injunction to order someone to do something he is already doing or something which is impossible for him to perform. Therefore, this Court can see no reason for the requested injunction to be issued. The petition will be denied and the case dismissed.

Dated: April 26, 1966.

GORDON E. YOUNG
United States District Judge

Order of Dismissal

(Filed April 26, 1966)

In accordance with memorandum opinion filed this date, the complaint is dismissed.

Dated: April 26, 1966.

/s/ GORDON E. YOUNG
United States District Judge

Opinion of United States Court of Appeals For the Eighth Circuit

[Filed August 9, 1967.]

Before VOGEL, Chief Judge, VAN OOSTERHOUT and GIBSON, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

This timely appeal is taken from final judgment dismissing a class action brought by plaintiffs as parents and next friends of sixteen minor Negro students attending grades five, ten and eleven of the defendants' district Negro school against the Board of Education of the Gould School District pursuant to 28 U.S.C.A. § 1343(3) and 42 U.S.C.A. § 1983, seeking injunctive relief. The prayer of the original complaint is to enjoin the defendant Board from:

> "(1) requiring minor plaintiffs and all other similarly situated to attend the all-Negro Field School for the 1965-66 School Term;
>
> (2) providing public school facilities for Negro pupils in Gould, Arkansas which are inferior to those provided for white pupils;
>
> (3) expending any funds for operation or improvement of the predominantly white Gould Public Schools until and unless the Field School is made substantially equal in facilities, equipment, curriculum, advantages, opportunities, etc. to the predominantly white Gould schools; and

(4) otherwise operating a racially segregated school system."

At the close of all of the evidence, plaintiffs amended their complaint by striking item (3) above set out and substituting in lieu thereof:

> "the prayer to have any future high school facilities in the Gould School System constructed on or near the premises of the present Gould high school, which is now attended predominantly by white pupils, . . ."

Upon appeal, plaintiffs again altered their position and urged that the Board be restrained from using the new building construction as a replacement for the Field High School and that instead, the building be converted into a unit of a completely integrated grade school. The issue last stated is raised for the first time upon appeal and was not presented to the trial court and no opportunity was afforded the parties to offer evidence on the feasibility of such a plan, nor was the trial court given any opportunity to pass thereon. It is fundamental that issues not presented to or considered by the trial court cannot be considered upon appeal.

The trial court, in our view, states the issues properly raised by this appeal as follows:

> "The question before the Court is actually two pronged. First, is this Court authorized to tell the school board where to build or not to build a new school building, and second, should the Court do so under the circumstances in this case?"

The trial court on the first issue recognized that under appropriate circumstances a constitutionally discriminatory construction program could be enjoined, stating:

> "However, this Court is not prepared to state that there might not be circumstances under which the Court would be justified in taking action such as that the plaintiff is asking for in this case. Assuming without deciding that this is an area of school policy-making which the Court could enter to protect the civil rights of the school district's citizens, this Court does not feel that the circumstances of this case merit such action."

Our recent decision in *Kelley* v. *Altheimer*, 8 Cir., . . . F.2d . . . (April 12, 1967), recognizes that a court may enjoin a construction program which is designed to perpetuate segregation. The supporting facts in *Altheimer* are far stronger than those in our present case. We recognized in *Altheimer* that injunctive relief against construction could not be effective after a building is constructed. Such appears to be the situation here.[1]

The trial court as a basis for its refusal to exercise its equitable powers to grant the injunction requested states:

> "Here the school board has begun a desegregation program for all twelve grades without having been ordered to do so by a court. The delay in the program for the three grades involved in this case is

[1] Attached to plaintiffs' brief is an affidavit of their attorney dated April 28, 1967 which states that the building in controversy is under construction and from which it would appear that considerable progress had been made upon such construction.

temporary and future plans call for complete integration. The fact that the Negro children who are attending the previously all-white schools are participating in the school's curricular and extra-curricular activities seems to indicate that this plan is more than a pretense or sham to meet the minimum requirements of the law.

"The availability of campus area in one place and not the other, the lack of funds to procure more land, and the necessity of locating the new high school near the existing gymnasium designed to accommodate the high school students are all valid reasons for the administration's decision as to the location of the new high school. There is no reason to assume that only Negro students will attend the new high school. In fact, it is a virtual certainty with the progress of integration, building space limitations alone will insure that the new school will be integrated. Certainly these reasons, coupled with the school board's recent initiative toward integrating the schools, do not indicate that the board's plans are solely motivated by a desire to perpetuate or maintain or support segregation in the school system. Therefore, the Court will not usurp the normal managerial prerogative of the school board to the extent of determining where the new building will be located."

We note that the Field High School which was being replaced is the oldest building in the school system. The bulk of the evidence in this case is directed at its many deficiencies and dilapidated condition. The Negro segment of the community had for years been insisting that

a replacement of such building be made and continued to assert such position throughout the trial and at least until the amendment made at the close of all of the evidence hereinabove set out. Reference is made in plaintiffs' testimony to an alleged prior action which purported to require the Board to give priority to the upgrading of the Field High School and the Board's commitment so to do. The evidence discloses that the district is weak financially and that prior construction was largely prevented by statutory limitations upon bonded indebtedness. It would appear that such obstacle would be cleared up by the completion of payments on prior bonded indebtedness by 1967. There is absolutely nothing in the record to indicate the nature of the plans for the new high school building under construction on the Field elementary school grounds. The evidence does disclose that a gymnasium and certain other facilities on such ground already in existence had been used and would continue to be used by students in the Field High School. Moreover, there is no showing that the Field facilities with the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school when the appropriate time for such course arrives. We note that the building now occupied by the predominantly white Gould grade school had originally been built to house the Gould High School.

As pointed out by the trial court, the defendant Board had voluntarily adopted a desegregation plan for the schools which it operates, the plan to be in effect in September 1965. Such plan went considerably beyond the minimum requirements of the Department of Health, Edu-

cation and Welfare (H.E.W.), providing for immediate unrestricted freedom of choice of school attendance on the part of all students, and provision was also made for faculty desegregation. The desegregation plan is similar to a plan we indicated would be approved in *Kemp* v. *Beasley*, 8 Cir., 352 F.2d 14.

Subsequently, when the students exercised the freedom of choice provided for by the plan, it developed that grades five, ten and eleven would be seriously overcrowded which led to an amendment making the freedom of choice inoperative for the 1965-66 school year with respect to grades five, ten and eleven but fully effective thereafter. The plan as amended was approved by H.E.W. As stated in *Kemp* v. *Beasley*, supra, final responsibility for determining the constitutionality of desegregation plans rests with the court but H.E.W. guidelines are entitled to considerable weight.

In *Clark* v. *Board of Education of Little Rock Sch. Dist.*, 8 Cir., 374 F.2d 569, we approved a freedom of choice plan similar to that adopted by the Board here. We stated:

> "[W]hen a student is given a well publicized annual right to enter the school of his choice, coupled with periodic mandatory choices as set forth in the Board's amended plan, we can find on the face of it no unconstitutional state action. . . .
>
> Therefore, if in fact all the students wishing to transfer were fully accommodated, the Constitution would unquestionably be satisfied, and apparently under these circumstances petitioners would have little objection to the plan's operation. . . ." 374 F.2d 569, 571-72.

We recognized in *Clark* that a plan appropriate on its face could be unconstitutionally administered and observed that in case of such a development, the District Court upon appropriate application could do what is necessary to bring the plan up to constitutional standards.

Prior to 1965, the defendant District had operated an all-Negro school known as the Field school and an all-white school known as the Gould school on a segregated basis. The district is a predominantly agricultural district with little industry. The population is approximately 3,000 of which 60% are Negro. There are about 880 students in the system of which 580 are Negro.

Under the freedom of choice plan adopted, all students expressed their attendance preference. Seventy-one Negroes who expressed a preference for the Gould School were accepted for attendance at that school. All preferences except those for overcrowded grades five, ten and eleven were fully respected. Twelve of the forty Negro students applying were accepted in grades five, ten and eleven. Those who were accommodated at Gould lived the greatest distance from Field. Under the plan all preferences are to be honored commencing with the 1966-67 school year.

The evidence shows that the defendant Board has taken substantial steps to narrow the gap between the salaries paid to white and Negro teachers and that any discrepancy in this respect will be completely eliminated by the 1966-67 school year. The superintendent as a witness also stated that no teachers would be discharged as a result of the integration. It also appears that the transportation of pupils has been integrated.

Opinion of United States Court of Appeals For the Eighth Circuit

The enrollment at the Gould school in 1965-66 consisted of 71 Negro students and 298 white students. Thus substantial progress toward integration has been made in the first year of the plan's operation. With the restricted grades open for freedom of choice and upon the basis of the favorable acceptance of the Negro students at the Gould school, it is reasonable to anticipate that integration will rapidly progress as predicted by the trial court.

The complaint charges coercion has been used against integration. The Chief of Police of Gould was named as a defendant on this charge. The case was voluntarily dismissed by the plaintiffs against him. There is no substantial evidence that any coercion was exercised to deter Negro students from electing to attend the white school. The record fairly shows that the integration plan has operated smoothly and that the Negro students have been encouraged to elect the white school.[2]

---

[2] The testimony of the president of the school board includes the following:

"We have had wonderful cooperation out of the white people and the colored people. I'd say that we have got ninety-five percent of the cooperation out of both sides. And the Board as a whole—if I might elaborate just a little—has gone out of our way in going to athletics—not just the Board, but all the people, to go to our athletic program, or any social functions and to discourage any violence or any nagging, or anything of that nature, not only with the white patrons, but the colored patrons, we've had wonderful cooperation. We've got a small minority that's not interested in our schools or our people or our economy or our welfare that don't even have kids. We haven't had any trouble out of people that's got kids that's going to school—colored or white. We've had wonderful cooperation out of them.

. . . .

"Q. Do you have any knowledge of any such coercion or undue influence attempted to be exercised with respect to the students

The trial judge by reason of his presence at all stages of the trial has the feel of the case. The court's findings are based upon substantial evidence and are not clearly erroneous. Moreover, the trial court has a large discretion in determining whether an injunction should be granted. See 43 C.J.S.2d Injunctions §§ 14, 15, and cases there cited.

Plaintiffs have failed to demonstrate that the trial court abused its discretion in denying the injunction here sought.

Plaintiffs alternately upon this appeal ask us to issue a comprehensive decree governing the desegregation process similar to that in *Kelley* v. *Altheimer*, supra. The record in this case does not warrant such relief. Unlike the Altheimer situation, no attack has been made in the pleadings on the desegregation plan adopted by the Board. Additionally, we find no substantial evidence to support a finding that the Board was not proceeding to carry out the plan in good faith.

Primary responsibility for the operation of the public schools rests in the school board. Courts are not equipped to solve the everyday problems of school operation. The court's interference with the Board's operation of its school is justified only upon a showing that the Board in

---

making their choices, that are allocated under this plan, by any employees or representatives of the Gould School District?

A. None whatever, by no member of the faculty, no member of the School Board, or no farmers. In fact we have encouraged colored people to send their kids up to the white school. To the contrary, they have failed and refused—people that we thought we could talk with if something come up, that we could adjust the situation. There hasn't been any economic pressure put on. Almost every member of this Board has got colored people living on their farm that have colored children in the white schools."

its operation of its school is depriving pupils of rights guaranteed by the federal constitution.

In *Brown* v. *Board of Education of Topeka,* 349 U.S. 294, 299, the Court states:

> "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal."

In our present case, no issue on the adequacy of the plan adopted by the Board or its implementation was raised in the District Court. Issues not fairly raised in the District Court cannot ordinarily be considered upon appeal. *Hormel* v. *Helvering,* 312 U.S. 552, 556; *Duignan* v. *United States,* 274 U.S. 195, 200; *Smith* v. *American Guild of Variety Artists,* 8 Cir., 368 F.2d 511, 514.

The judgment is affirmed.[3]

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[3] The evidence in this case was taken on November 24, 1965. Due to disability of the reporter, the preparation of the transcript of testimony was delayed and this has delayed the appeal. Since the hearing in the trial court, the 1966-67 school year has been completed and the 1967-68 year is about to commence. Our decision is based upon the record before us. If subsequent evidence should prove that the defendant Board is not fairly administering its integration plan, resort to the equitable powers of the District Court is open to any aggrieved party.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1966

No. 18,527

Arthur Lee Raney, by his mother and next friend, Mrs. Roxie Raney; Bobby Cox and Annette Cox, by their grandmother and next friend Mrs. Carrie Dilworth; Charles Washington, by his mother and next friend, Mrs. Vertis Frazier; Dennis James Bailey, by his mother and next friend, Mrs. Olens Bailey; Robert Hall, by his mother and next friend, Nonie Mae George; Wyvonne Dale, by her mother and next friend, Laverne Dale; Earnestine Dale, by her father and next friend, E. W. Dale; Irma Jean Clark, by her grandmother and next friend, Mrs. Mattie Harper; Linda Wright, by her grandmother and next friend, Mrs. Blanche Newman; Jake Taylor, Jr., and Linda Austin, by their mother and next friend, Mrs. Beatrice Austin; Willie Lee Jones and Stella Harper, by their parents and next friends, Mr. and Mrs. Rice Harper; Bobbye Carolyn Hadden, by her mother and next friend Mrs. Norma Jean Hadden; Jesteen Jasper, by her father and next friend, Jim Jasper,

Appellants,

vs.

Board of Education of the Gould School District.

Judgment

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 9th, 1967.

Order Denying Petition for Rehearing

(Filed September 18, 1967)

Appellants' Petition for Rehearing en banc or by the Panel filed in this cause having been considered, It is now here Ordered by this Court that the same be, and it is hereby, denied.

UPREME COURT. U. S.

DEC 18 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 805.

ARTHUR LEE RANEY, et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT, a Public Body Corporate, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

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OCTOBER TERM, 1967.

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a Public Body Corporate, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTIONS PRESENTED.

Petitioners set out the first Question Presented as follows (Pet. 2):

> 1. Whether—13 years after **Brown v. Board of Education**,—a "freedom of choice" plan which maintains an all-Negro school is constitutional in a system with only two nearby school plants, one traditionally Negro and the other traditionally white, although assigning elementary grades to one school and secondary grades to the other would immediately desegregate the system.

This question seeks to have the Court review an issue that was not tried in the district court. The issue tried in that court was whether it could and should require a proposed school building to be built on a particular site because of the effect of such construction on the desegregation of the school district (Pet 10a). It decided it could do so, but that the evidence did not warrant such action in this instance (Pet. 14a).

The court of appeals rejected the argument of these petitioners that it should order a redistribution of students within the school system, specifying what grades should be taught at each school, because that question (like the one petitioners seek to present here) was raised for the first time on appeal (Pet. 17a). The only question on this phase of the case presented by the Record and the decisions of the courts below is:

> "1. Whether this Court should consider the constitutional adequacy of 'freedom-of-choice' plans on the Record in this case which contains no evidence showing the operation of respondents' plan subsequent to its adoption in 1965, and in which the question was not presented to, nor passed upon by, the district court?"

The second Question Presented as stated by petitioners is (Pet. 2):

> 2. Whether the court of appeals erred in denying all relief, dismissing the complaint, and declining to order the district court to supervise the desegregation process on the ground that the Department of Health, Education and Welfare had initially approved the Board's plan as facially sufficient to comply with Title VI of the Civil Rights Act of 1964.

This question does not fairly characterize the decision of the court of appeals. That court held that the plead-

ings did not attack the respondents' desegregation plan (Pet. 24a), that no issue as to the adequacy of the plan or its implementation was raised in the district court (Pet. 25a), and there being no evidence that respondents were not proceeding to carry out the plan in good faith there was no basis for the district court to assume the detailed supervision of desegregation of this school system. That court agreed with the district court's observation (Pet. 14a):

> "It is obviously not the purpose of an injunction to order someone to do something he is already doing * * *."

An accurate statement of the question presented by this phase of the decision of the court below is:

> "Whether it was error for the court of appeals to affirm dismissal of the complaint by the district court where both courts found that plaintiffs had utterly failed to sustain the burden of proof on the issues joined in, and tried by, the district court, and both courts found (on substantial evidence) that respondents were proceeding in good faith to desegregate the district?"

STATEMENT.

It would unduly lengthen this brief to reply in detail to petitioners' efforts to picture respondents as hostile to Negroes seeking to exercise their constitutional rights and as being guilty of bad faith in the operation of the school system and its desegregation plan. It is sufficient answer to note that both of the courts below heard such charges and found them so lacking in factual support that the action was dismissed.

The facts in the Record are such that the court of appeals concluded:

> "The record fairly shows that the integration plan has operated smoothly and that the Negro students have been encouraged to elect the white school" (Pet. 23a).
>
> • • • • • • •
>
> "Additionally, we find no substantial evidence to support a finding that the Board was not proceeding to carry out the plan in good faith" (Pet. 24a).

The distorted picture drawn by petitioners of the conduct of desegregation in this school district is obviously designed to draw attention away from the issues actually litigated in the courts below and to suggest issues, not tried below, that are within the ambit of this Court's sensitivity to protection of minority group constitutional rights. However, the Record does not reflect hostility by respondents to the exercise of such rights by those represented by petitioners. This school district moved promptly to comply with the Civil Rights Act of 1964, and in a display of utmost good faith submitted a desegregation plan to the Department of H. E. W. providing for a much more rapid rate of desegregation than was required by the Regulations of that Department. Unlike most school

districts of the South, the majority of which chose to desegregate over a period of three years as permitted by those Regulations, this district elected to fully desegregate all twelve grades the first year.

The assignments resulting from the exercise of the freedom of choice right placed seventy-one Negro students with 299 white students at the previously white school (R. 79-80). The Record reflects the success of the respondents' plan of desegregation. The Negro students were accepted as members of the Gould school's athletic teams (R. 99-100), and several in each class earned enrollment on the honor roll (R. 100).

It is equally important to note what the Record does not reflect. It does not reflect any fact concerning the operation of the desegregation plan subsequent to the trial on November 24, 1965. It does not reflect the progress of desegregation pursuant the plan in the 1966-67 school year and it does not reflect such progress during the current school year. Neither does it reflect the status of faculty desegregation for those years subsequent to the trial.

The Record here simply does not afford a basis for review of the questions propounded by petitioners.

ARGUMENT.

Petitioners' Question No. 1 seeks to test the constitutional validity of "freedom of choice" plans generally. The assertion is that if the school assignments chosen pursuant to such a plan include a sufficient number of Negroes electing to attend a particular school that the result is an all-Negro student body, then this Court should hold that the plan is inadequate to satisfy the mandate of **Brown v. Board of Education.** The argument ignores this Court's recognition of the constitutional adequacy of freedom of choice assignment procedures that was implicit in **Goss v. Board of Education,** 373 U. S. 683, where it is said at page 689:

> "This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial conditions, would fall. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein."

However, aside from the merits of the question, this Record affords no basis for its presentation. The only question litigated in the district court, and the only question decided by that court, was whether it should order the school authorities to build a proposed school building at a particular site (Pet. 10a, 13a). When the petitioners urged the court of appeals to pass on a question somewhat akin to that they now seek to present here, that court said (Pet. 17a):

> "Upon appeal, plaintiffs again altered their position and urged that the Board be restrained from using the new building construction as a replacement for the Field High School and that instead, the build-

ing be converted into a unit of a completely integrated grade school. The issue last stated is raised for the first time upon appeal and was not presented to the trial court and no opportunity was afforded the parties to offer evidence on the feasibility of such a plan, nor was the trial court given any opportunity to pass thereon. It is fundamental that issues not presented to or considered by the trial court cannot be considered on appeal."

Moreover, as already noted, there is no factual basis upon which to measure the adequacy of respondents' desegregation plan in its practical operation. There is nothing in this Record to show how the plan has operated, and what has been its results, since the trial in November, 1965. If in fact the plan has not been operated fairly, or in its operation has failed to meet constitutional standards, then the doors of the district court are always open for any aggrieved party to plead and prove such circumstances in a proper proceeding. Some of the same attorneys who represent petitioners here did file another suit against this school district on June 8, 1967, in the United States District Court for the Eastern District of Arkansas (Civil Action No. PB 67 C-39), raising issues pertaining to desegregation but not those they seek to raise here. That suit was heard by a different district judge from the one who tried the case at bar, the complaint was dismissed, and an appeal now pends in the court of appeals (**Freeman v. The Gould Special School District of Lincoln County, Arkansas**, No. 19016).

Petitioners suggest that there is a relationship between this case and **Green v. County School Board**, No. 695, October Term, 1967, and **Monroe v. Board of Commissioners**, No. 740, October Term, 1967, each now pending on a petition for writ of certiorari. While the questions presented in those cases, as framed by petitioners, may

be somewhat similar to those they present here, the significant consideration is that the Record here does not afford a basis upon which the questions so presented could be decided. It is respectfully submitted that the petition was filed in this case for the sole purpose of permitting reference to the other two pending petitions, advancing further arguments on the questions therein presented, and thereby exaggerate the importance of those questions.

Petitioners' Question No. 2 is grounded upon the assertion that the court of appeals misconceived the obligation of the lower federal courts created by the **Brown** decisions to retain school desegregation cases on their dockets. Indeed this Court did say in **Brown v. Board of Education,** 349 U. S. 294, 301:

> "During this period of transition, the courts will retain jurisdiction of these cases."

The court obviously had reference to the five consolidated cases then before it, but the lower federal courts have taken this language to require that other school desegregation cases be retained on the district court docket where injunctive relief has been granted to insure that the terms of the injunction are carried out. As a result there are several hundred such cases now pending in the district courts, and many have been on those dockets for several years.

On the other hand, the **Brown** decisions cannot fairly be read to support the assertion that in any case having any relationship to school desegregation, however remote, the district is obligated to retain the suit on its docket *ad infinitum.* If this substantial class of cases were exempt from dismissal, when dismissal is the adjudication dictated by traditional legal and equitable rules, the obvious result would be an intolerable financial burden

on the litigants of being in court forever and a significant reduction in the authority of the district courts to effectuate an orderly management of their dockets.

Of course, the quoted language in **Brown** was not intended to have a reach so great as to produce such absurd results. It implied no more than that these cases would be retained on the district court dockets for so long as the circumstances in each case indicated a need for judicial supervision of the desegregation process. In cases such as the one at bar where the circumstances make appropriate a final judgment then the **Brown** language does not inhibit such disposition. It must be remembered that in this case the lower courts expressly found that respondents were proceeding in good faith to administer a desegregation plan that met constitutional standards and which was voluntarily adopted before the filing of the suit. The proof showed that they were already voluntarily discharging their constitutional obligations and manifesting the intention to continue to do so. In view of this the district court concluded: "It is obviously not the purpose of an injunction to order someone to do something he is already doing * * *." This is so well supported by both logic and precedent that it is not fairly debatable.

The court of appeals that heard this case suffers from no misconception about the obligation of the district courts to retain jurisdiction in these cases when such a course would serve the interests of justice under the circumstances. It has frequently reversed district court decisions dismissing these cases and directed that the cases be restored to the district court dockets, the most recent such decision being **Yarbrough v. Hulbert-West Memphis School District**, 380 F. 2d 962 (8 Cir., 1967).

However, where the parties have joined issue by their pleadings and their proof, and where after a full trial the district court has decided that the evidence does not

entitle plaintiffs to any judicial relief on those issues, it would be absurd to require that the case be retained on the docket simply because it had something to do with school desegregation and there was the speculative possibility that some different issue might arise between the parties in the future. The doors of the district courts remain open to adjudicate such future controversies, if and when they arise, in fresh litigation.

CONCLUSION.

The decision of the court of appeals is correct: it is in accord with the applicable decisions of this Court; and the questions petitioners seek to present here are unsupported by the Record. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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December, 1967.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 805

ARTHUR LEE RANEY, *et al.*,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT, a Public Body Corporate, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1967

No. 805

ARTHUR LEE RANEY, *et al.*,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT, a Public Body Corporate, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

Citations to Opinions Below

The unreported April 26, 1966 opinion of the district court is reprinted in the appendix, at pp. 12-24. The August 9, 1967 opinion of the court of appeals is reported at 381 F.2d 252 and is reprinted in the appendix at pp. 143-52.

Jurisdiction

The judgment of the court of appeals was entered August 9, 1967 and petition for rehearing was denied September 18, 1967, appendix, pp. 153, 154. The petition for writ of certiorari was filed November 9, 1967 and the writ was granted January 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the court of appeals erred in denying all relief, dismissing the complaint, and declining to order the district court to supervise the desegregation process on the ground that the school board was acting in good faith and the Department of Health, Education and Welfare had initially approved the board's plan as facially sufficient to comply with Title VI of the Civil Rights Act of 1964.

2. Whether—13 years after *Brown* v. *Board of Education*,—a "choice" plan which maintains an all-Negro school is constitutional in a system with only two nearby school plants, one traditionally Negro and the other traditionally white, although assigning elementary grades to one school and secondary grades to the other is a feasible alternative assignment method which would immediately desegregate the system.

Constitutional Provision Involved

This case involves Section I of the Fourteenth Amendment to the Constitution of the United States.

Statement

Fifteen Negro students and their parents filed a class action September 7, 1965, to enjoin the Gould School Board from (1) requiring them and all others similarly situated "to attend the all-Negro Field School" (2) "providing public school facilities for Negro pupils . . . inferior to those provided for whites" (3) "expending any funds for . . . white Gould Public Schools until and unless the Field School is made substantially equal" and (4) "otherwise

operating a racially segregated system" (A. 3-8). During trial, November 24, 1965, plaintiffs first learned of a proposed school construction program and, with leave of court, amended the complaint to pray that replacement high school classrooms be constructed on the premises of the white Gould High School, rather than at the Negro Field School (A. 12, 19, 138).

Gould is a small district of about 3,000 population, and total school enrollment of 879 in the 1965-66 school year (A. 79-80). Until the 1965-66 school year the district had not taken any steps to comply with *Brown* v. *Board of Education*, and operated completely separate schools for Negro and for white pupils with racially separate facilities (A. 31). All Negro students were instructed in a complex of buildings known as the Field Schools and all white students were taught in a complex of buildings known as the Gould Schools (A. 31). The two complexes are located about 10 blocks from each other; each contains an elementary school and a secondary school (A. 31, 73).

The school district did not consider undertaking any desegregation program until the United States Department of Health, Education, and Welfare issued Guidelines implementing Title VI of the Civil Rights Act of 1964 (A. 121-23). The district adopted a "freedom of choice" plan of desegregation for all 12 grades, but later obtained approval from H.E.W. to withdraw three grades from the plan's operation for 1965-66 because of "overcrowding" in those grades caused by Negro requests to go to the white school. There were no white requests to go to the Negro school. As a result some 28 Negro pupils, in the 5th, 10th and 11th grades were turned away from the white school (A. 14, 53-60, 62-63). During the 1965-66 school year, the enrollment figures for the school district were as follows (A. 79-80):

	Grades	*Negro*	*White*
Field Complex	1-12	477	0
Gould Complex	1-12	70	299

During the 1966-67 school year, the second year of "freedom of choice", the enrollment figures were as follows:[1]

	Grades	*Negro*	*White*
Field Complex	1-12	477	0
Gould Complex	1-12	71	304

New Construction to Perpetuate Segregation

At the time this action was filed the white Gould High School, constructed in 1964, was the most modern facility in the district (A. 89). Adjacent white Gould Elementary School was constructed in 1947, originally as a high school, and was subsequently converted to an elementary school (A. 81-82). The Negro Field Elementary School is also modern, constructed in 1954; gymnasium and auditorium were added in 1960 (A. 89-91). Negro high school classrooms, however, were located until the 1967-68 school year

[1] The record in this case, like the records in all school desegregation cases, is necessarily incomplete by the time it reaches this Court. In this case the 1965-66 school year was the last year for which the record supplies desegregation statistics. Information regarding student and faculty desegregation during the 1966-67 and 1967-68 school years was obtained from official documents, available for public inspection, maintained by the United States Department of Health, Education and Welfare. This information is based upon data supplied to the United States by respondent school district. Certified copies of these documents and an accompanying affidavit were deposited with this Court and served upon opposing counsel with the petition for writ of certiorari.

The school board has also been sued by 6 Negro teachers claiming discriminatory termination of employment. The record in that case, *Freeman v. Gould Special School District*, No. 19,016, 8th Cir. (R. 165-67) shows that for the school year 1967-68 approximately 80 to 85 Negroes attend the Gould complex and no whites attend the Field complex.

in a building, constructed in 1924, concededly obsolete and in every respect inferior to the white high school (A. 10, 16, 130). Promises by the Board to improve the Negro high school date back to 1954, a decade before any consideration was given to desegregation, and apparently resulted from a suit to require equal facilities for Negroes (A. 131-132, 129). Actual construction of a new high school building on the site of the Field School, however, did not begin until January, 1967. The new building opened in Fall, 1967, subsequent to the decision of the court of appeals (A. 65, 66).

Plaintiffs sought to shift the construction site of the new high school to the site of the white school by a timely amendment during a November 24, 1965 hearing, immediately after learning of the proposed construction (A. 137-138). The district court allowed the amendment (A. 12, 19) but refused to grant relief in an opinion in April 26, 1966. Because of illness the court reporter did not complete the transcript until one year later—April 1, 1967—thereby delaying determination of the appeal (A. 140, 152). Because the construction of the replacement facility at the Negro school had progressed by the time briefs were filed in the court of appeals, petitioners asked that court to require a utilization of the Gould School site as the single secondary school, and the Field School site as the single elementary school for the district (A. 144).[2] It was urged that such a utilization was practical, economical, educationally superior and would disestablish segregation; on the other hand to permit the racial construction to stand unmodified would make disestablishment by "choice" plan impossible.

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[2] Petitioners presented to the court of appeals an affidavit of their attorney stating that as of April, 1967 the outer shell of the new building was completed but that a number of walls, plumbing facilities and fixtures and interior walls, the roof and flooring had not been completed (A. 141, 145).

At trial, the superintendent admitted that the old Field High School was clearly a "Negro" school, and probably would continue to be an all-Negro school if replaced with a new facility at the Field site (A. 67). He also conceded that it was inefficient for a small school district to construct a new secondary school when it already had one. There would be duplication of libraries, auditoriums, agriculture buildings, science laboratories, cafeterias, and other facilities (A. 74-76). He was asked (A. 76):

> Q. "This means that you have to spend a lot more money for equipment and for materials for the Negro school in order to just have an equal department with the white school?"

He answered:

> "I suppose so. It would take more money to build a new building and equip it."

Unequal Facilities and Programs

The record shows that for many years prior to constructing the new Negro high school in 1967 the board tolerated substantial inequalities between the segregated schools. The old all-Negro high school, a wooden frame structure, was admitted by the president of the board to have been "grossly inferior" to the white high school (A. 10, 16, 130). He said that the reason no money was spent on the building was that every dollar available had been exhausted on other uses (A. 130). Nevertheless, a new all-white high school was constructed at the Gould site (rather than at the Negro Field site) in 1964 following a fire which destroyed the old high school building there (A. 83).

The Negro Field High School is completely unaccredited; the Arkansas State Department of Education rates the Field Elementary School class "C" (A. 31) and the white Gould Schools "A" (A. 10). The Negro school bathrooms were in a building separated by a walk exposed to weather (A. 51-52); the white schools had rest rooms in each building (A. 50, 52). There is an agriculture building at the predominantly white high school, and a hot lunch program for elementary and secondary students but none at the Negro site (A. 40-41). The library at the white high school contains approximately 1,000 books, and a librarian (A. 42-43). The Negro school has only three sets of encyclopedias, one purchased a month before the hearing in this case (A. 113-114). These books were kept in the principal's office, rather than in a separate library, and the principal, in effect, functions as librarian, to the extent that such function is required (A. 114). The superintendent had a complete lack of knowledge of the extent of library facilities at the Negro school (A. 42).

The science facilities at the Negro high school were inferior to those of the predominantly white high school, even though the former was larger (A. 43-44). Pupils who attend Gould generally have an individual desk and chair; the standard pattern at the old Negro school was a folding table with folding chairs and three students on each side, sitting at the table (A. 47-48).

The "per pupil" expenditure is less at Field School than for the formerly all-white, now predominantly white, Gould School (A. 44). The system has charged "enrollment fees" to pupils at Field, but not at Gould (A. 44-45). It was also the practice to require Negro students to pick cotton in the fields during class time to earn money for school fund raising projects, and to pay "enrollment fees" (A. 44-46).

Unequal per pupil expenditures are also reflected in higher student-teacher ratio at the Negro school i.e., the average class size is larger (A. 59-62). There are 14 teachers at Gould, but only 16 teachers at Field although it has about 130 more students (A. 60-61). The range of Negro teacher salaries is from $3,870 to $4,500; for white teachers, the range is from $4,050 to $5,580 (A. 33-39).

There are also disparities in course offerings. Neither vocational agriculture nor journalism, offered at Gould, are offered at Field (A. 52-53). There is a similar disparity in extracurricular activities. The larger Negro school, for example, has no football program but there is a football team at the white school (A. 106-107). There is a Future Farmers of America vocational club at the white school, but none at the Negro school "because they do not have an agricultural department" (A. 106).

Teacher Segregation

The school system has no "definite plans for faculty desegregation" (A. 67, 68). In 1965, the board "did not have any plans to reassign anybody" (A. 69). By the 1966-67 school year, the only faculty desegregation which had taken place was assignment of one part time white "supervisor" to the Negro school[3] and for the 1967-68 school year the only anticipated change was addition of a part time white teacher at the Negro school. Faculty meetings had not been integrated (A. 68). At trial, the superintendent stated that ". . . we have kept that in the background, we want to get the pupil integration question settled and run-

[3] See Note 1, *supra*.

ning as smoothly as possible before we go into something else" (A. 68). When asked whether re-assignments of faculty members were eventually contemplated, the superintendent stated that the school system "will attempt to employ Negro teachers in a predominantly white school on a limited basis, and particularly in positions that do not involve direct instructions to pupils" (A. 69). The superintendent described the Negro teachers' academic qualifications as superior to the white teachers. Every Negro teacher had a bachelor's degree and two had master's degrees. Only one white teacher had a master's degree; two have no degree (A. 33, 94-95).

Intimidation

When the PTA at the Negro school began to protest to the superintendent and the board the deplorable conditions at the old Negro high school, the superintendent responded by issuing an order which forbade the Negro PTA from meeting in the Negro high school (A. 63-64). He stated:

> "The reason for that is, as I understood, the PTA had evolved into largely a protest group against the school board and the policies of the Board. The members of that organization were the same who planned to demonstrate against the Gould high school and had sent chartered bus loads of people to Little Rock to demonstrate around the Federal Building, who were getting a chartered bus of sympathizers to come to this hearing today and it does not seem right to us to furnish a meeting place for a group of people that is fighting everything we are trying to do for them" (A. 64).

When questioned whether this meant the Negro high school parents could not have a PTA, the superintendent responded: "They can have a PTA but they can meet somewhere else" (A. 64). He later admitted that he had no knowledge that any plans for marches or demonstrations had been made at a PTA meeting, and that all that he heard to this effect was hearsay (A. 108-109). The superintendent and some members of the board obtained an injunction against several civil rights groups, enjoining them from protesting conditions in the system (A. 63).

Denial of Relief by the Courts Below

The district court denied all relief and dismissed the complaint on April 26, 1966 (A. 12-25). In its opinion, the court relied on the fact that the school district had adopted a plan without court order, that the plan was approved by the Department of Health, Education, and Welfare, and that some Negro students were attending the "white" school. With respect to the board's plan to construct new high school replacement facilities on the site of the Negro school, rather than enlarging the previously all-white school, the court decided that the replacement plan at the Negro school site was not "solely motivated by a desire to perpetuate or maintain or support segregation in the school system" (A. 24-25).

The court of appeals found that the board was operating under a "choice" plan which on its face met standards approved by the circuit and H.E.W.; that there was "no substantial evidence to support a finding that the board was not proceeding to carry out the plan in good faith"; that progress was being made in equalizing teachers' salaries; and that relief requiring that the replacement construction be undertaken at the Gould site could not be

effective because by the time the appeal was considered considerable progress had been made in constructing the building on the Field site.[4]

Although the court found that "there is no showing that the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school *when the appropriate time for such course arrives*" (emphasis supplied), it declined to order conversion of one school plant to use as an elementary school and the other as a secondary school, on the ground that such relief had not been considered by the trial court. Rather than remanding the case to the district court for consideration of such relief, the court affirmed dismissal of the complaint. In addition, the court took the position that petitioners were not entitled to a comprehensive judicial decree governing the operation of the "choice" plan, as ordered by a different panel of the court in *Kelley* v. *Altheimer*, 378 F.2d 483 (8th Cir. 1967):

> Unlike the Altheimer situation, no attack has been made in the pleadings on the desegregation plan adopted by the Board. Additionally, we find no substantial evidence to support a finding that the Board was not proceeding to carry out the plan in good faith. (A. 151)

A petition for rehearing en banc or by the panel, adverting to a conflict between the decision of the panel and the decision in *Kelley* v. *Altheimer, supra,* with respect to

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[4] Plaintiffs filed notice of appeal and oral argument was originally scheduled at the same time as a case involving similar issues, *Kelley* v. *Altheimer*, 378 F.2d 483 (8th Cir. 1967). However, the court reporter was ill for an extended period of time, and was unable to complete the transcript until April 1st, 1967 (A. 140, 152).

standards for approval of desegregation plans, was denied by the panel September 18, 1967.[5]

Summary of Argument

By dismissing the complaint, the courts below totally refused to supervise the desegregation process in this district and remitted Negro school children to an inadequate remedy under Title VI of the Civil Rights Act of 1964. Such a disposition is unprecedented. It is particularly difficult to comprehend here because the segregated system has not been disestablished and because, in formulating desegregation standards, the Department of Health, Education, and Welfare is guided by legal principles emanating from the courts.

There is a clear-cut choice in this district between a system composed of a reasonably-sized, integrated, elementary school and similar secondary school, or a system composed of two inefficiently-small, segregated, combination elementary and secondary schools. Under a "choice" plan the Negro school will continue to be all-Negro. On the other hand, a grade consolidation plan, utilizing one site as an elementary school and the other site as a secondary school, will immediately desegregate the system. The "choice" plan presently in operation is incapable of disestablishing segregation, but grade consolidation is sufficiently workable and attractive a method of administering the system for the lower courts to be required to consider it on the merits and order such relief, if not impractical.

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[5] The panel had attempted to distinguish *Kelley* stating that the "supporting facts in Altheimer are far stronger than those in our present case" (A. 145). The petition for rehearing *en banc* or by the panel, which strenuously objected to this characterization of the cases, is part of the record in this case but has not been printed. Petitioners have been informed by the office of the clerk of the court of appeals that this petition, pursuant to the Eighth Circuit practice, was denied by the panel which heard the *Gould* appeal and not by the court as a whole.

Brown v. *Board of Education* not only condemns compulsory racial assignments of public school children, but requires "a transition to racially non-discriminatory system." That goal is not achieved if schools are still maintained or identifiable as being for Negroes or for whites. It cannot be achieved until the racial identification of schools, consciously imposed by the state during the era of enforced segregation, has been erased. The specific direction in Brown II and general equitable principles require that school districts, formerly segregated by law, employ affirmative action to achieve this end. The courts below should fashion relief which, while consistent with educational and equitable principles, employs the speediest means available to disestablish the dual system and its vestiges, thereby achieving the unitary nonracial system mandated by the Constitution.

ARGUMENT

The Court Below Erred in Dismissing the Complaint Without Further Inquiry Into the Feasibility of Grade Consolidation or Other Relief Which Would Disestablish Segregation.

A. By Dismissing the Complaint, the Courts Below Abdicated Their Responsibility Under *Brown* v. *Board of Education* to Supervise Disestablishment of the Segregated System.

Petitioners made a timely challenge to construction of new secondary school classrooms at a Negro school site, inferior facilities offered Negro students, and continued operation of a segregated school system in Gould, Arkansas. They did not challenge the replacement of a dilapidated Negro school generally, but sought to require that the construction, not scheduled to begin for over a year, take place on the white school site. To do otherwise would result in

perpetuating an unmistakably identifiable Negro school in a system with only two school plants which had chosen to adopt a "choice" desegregation plan. The district court failed to enjoin construction at the Negro site, or to grant other relief, and dismissed the action. After a court reporter's illness delayed consideration of the appeal, the outer shell of the new classrooms was completed. In the court of appeals, petitioners sought utilization of the dual plants as constructed in a manner which would disestablish the segregated system or, alternatively, entry of a decree governing disestablishment of the dual system. The court ruled that it would not consider utilization of one plant for elementary students, and the other for secondary students, or entry of a decree governing the desegregation process because such relief was not sought in the trial court, and because there was "no substantial evidence to support a finding that the Board was not proceeding to carry out the [choice] plan in good faith" (A. 151). It affirmed dismissal of the complaint.

We submit this result demonstrates a misconception by the court of its equitable power and responsibility in a school desegregation case and an erroneous construction of what took place in the district court. Desegregation is by its nature a continuous process which requires continuing supervision by lower courts. Records on appeal are always somewhat out of date and relief to be effective must be fashioned with flexibility. In this case where completion of the construction merely altered the appropriate form of relief and where the desegregation of the district was at issue, dismissal of the complaint was improper abdication of any jurisdiction over the desegregation process. See *Brown* v. *Board of Education*, 349 U.S. 294, 301 (1955); *Calhoun* v. *Latimer*, 377 U.S. 263 (1964); *Brooks* v. *School Board of Arlington County*, 324 F.2d 305 (4th Cir., 1963); *Smith* v.

Morrilton, 365 F.2d 770, 783 (8th Cir. 1966); *Yarbrough* v. *Hulbert-West Memphis*, 380 F.2d 962 (8th Cir. 1967); cf. *Smith* v. *Hampton Training School*, 360 F.2d 577, 581 (4th Cir. 1966); *Buckner* v. *Board of Education*, 332 F.2d 452 (4th Cir. 1964) and cases cited. "School desegregation cases involve more than a dispute between certain Negro children and certain schools. If Negroes are ever to enter the mainstream of American life as school children they must have equal educational opportunities with white children." [6]

The fact that petitioners' request for consideration of a grade consolidation plan had not been sought in the trial court does not justify dismissal of this case. The construction to which the consolidation related and the failure of the board to disestablish segregation, were the subject of timely attack in the district court. It was not feasible to raise the issue of consolidation because at the time the trial was held (November, 1965) the new construction was not scheduled to begin for over a year (January, 1967). At the very least, the court of appeals was obligated to remand to the district court to supervise disestablishment of segregation and for a hearing, with instructions to order grade consolidation if appropriate. It is submitted that by dismissal of the complaint, at a time when segregation is entrenched, the panel failed to adhere to the rule of *Brown* v. *Board of Education*, 349 U.S. 294, 301 (1955) and numerous decisions of lower courts which hold that district courts must retain jurisdiction until a racially nondiscriminatory school system is a reality. Secondly, by refusing to be influenced by developments subsequent to trial, even though their genesis, the construction program, was subject to timely attack, the court took a too narrow view of the power and duty of a

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[6] *United States* v. *Jefferson County Board of Education*, 372 F.2d 847, affirmed *en banc*, 380 F.2d 385, 389 (5th Cir. 1967) cert. denied *sub nom. Caddo Parish School Board* v. *United States*, —— U.S. ——, 19 L.ed 2d 103 (1967).

federal court of equity in supervising desegregation and granting relief required by the Constitution.[7]

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[7] In the second *Brown* decision this Court directed that "in fashioning and effectuating the decrees, the courts will be guided by equitable principles." (349 U.S. at 300). Equity courts have broad power to mold their remedies and adapt relief to the circumstances and needs of particular cases as graphically demonstrated by the construction given to 15 U.S.C. §4 in restraining violations of the Sherman Antitrust Act. The test of the propriety of such measures is whether remedial action reasonably tends to dissipate the effects of the condemned actions and to prevent their continuance, *United States* v. *National Lead Co.*, 332 U.S. 319 (1947). Where a corporation has acquired unlawful monopoly power which would continue to operate as long as the corporation retained its present form, effectuation of the Act has been held even to require the complete dissolution of the corporation. *United States* v. *Standard Oil Co.*, 221 U.S. 1 (1910); *Schine Chain Theatres* v. *United States*, 334 U.S. 110 (1948). Compare *N.L.R.B.* v. *Newport News Shipbuilding & Drydock Co.*, 308 U.S. 241, 250 (1939); *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).

Numerous decisions establish that the federal courts construe their power and duties in the supervision of the disestablishment of state imposed segregation to require as effective relief as in the antitrust area. So in *Griffin* v. *School Board of Prince Edward County, Va.*, 377 U.S. 218 (1964) this Court ordered a public school system which had been closed to avoid desegregation to be reopened. *Carr* v. *Montgomery County (Ala.) Board of Education*, 253 F. Supp. 306 (M.D. Ala. 1966), ordered twenty-one (21) small inadequate segregated schools to be closed over a two year period and the students reassigned to larger integrated schools. *Dowell* v. *School Board of Oklahoma City*, 244 F. Supp. 971 (W.D. Okla., 1965), aff'd 375 F.2d 158 (10th Cir., 1967), cert. den. 387 U.S. 931 (1967), ordered the relief sought here—attendance areas of schools consolidated, with one school in each pair to become the junior high school and the other to become the senior high school for the whole consolidated area. The Fifth Circuit has held that a district court has power to enjoin "approving budgets, making funds available, approving employment contracts and construction programs . . . designed to perpetuate, maintain or support a school system operated on a racially segregated basis." *Board of Public Instruction of Duval Co., Fla.* v. *Braxton*, 326 F.2d 616, 620 (5th Cir., 1964). The Fourth Circuit and a panel of the Eighth Circuit have held that a school construction program is an appropriate matter for court consideration. *Wheeler* v. *Durham City Board of Education*, 346 F.2d 768 (4th Cir., 1965); *Kelley* v. *Altheimer*, 378 F.2d 483 (8th Cir., 1967).

The continuous nature of the desegregation process has consistently obligated appellate courts to fashion relief despite the occurrence of events subsequent to judgment in the district court. Such has been the

At one point in its opinion the court of appeals states that the parties had no opportunity to offer evidence on the feasibility of consolidation and the trial court had no opportunity to pass on the issue. If the defect was solely one of evidence, however, the proper remedy was remand for further proceedings, not dismissal. Other portions of the panel's opinion suggest, however, that it affirmed dismissal of the complaint for quite different, although also erroneous, reasons:

> Moreover, there is no showing that the Field facilities with the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school when the appropriate time for such course arrives (A. 147).

Utilization of one school as elementary and one as secondary school is thus acceptable to the court of appeals but only "when the appropriate time for such course arrives." Such language and other portions of the opinions of the courts below strongly imply that a notion of deliberate speed—effectuated by a "choice" plan—led to rejection grade consolidation and not solely that petitioners did not seek in the trial court altered utilization of classrooms which were over a year away from construction at the time of trial. But the time for deliberate speed is over. Over two years ago this Court stated, "more than a decade has passed since we directed desegregation of public school facilities with all deliberate speed. . . . Delays in desegregating school systems are no longer tolerable." *Bradley* v. *School Board of the City of Richmond*, 382 U.S. 103, 105 (1965). In 1964, the Court said: "There has been entirely

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common practice of the courts applying *Brown*, and indeed it had been the practice of the Eighth Circuit, until this case. *Calhoun* v. *Latimer*, 377 U.S. 263 (1964); *Smith* v. *Morrilton*, 365 F.2d 770 (8th Cir., 1966).

too much deliberation and not enough speed. . . ." *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 229.

If the failure of the court of appeals to remand for consideration of grade consolidation, or to subject the board to a comprehensive judicial decree, rather than dismissing the complaint, rests on a finding by the court that no attack had been made on the desegregation plan in the trial court, it rests on a finding which is clearly erroneous. As the district court said: "One of plaintiff's contentions is that the Court should enjoin the defendant school board from maintaining a racially segregated system. But the testimony discloses that the school board is no longer maintaining such a system" (A. 14). The complaint sought to enjoin the board from compelling any Negroes to attend the all-Negro school (relief fundamentally inconsistent with a "choice" plan) and also sought to enjoin the "operating of a segregated school system" (A. 8). The trial is replete with testimony concerning the actual and expected operation of the plan (A. 53-63, 67-71, 75, 95, 96, 101, 102, 109, 117-18, 121-23). Indeed, the district court refused to enjoin the board from maintaining a segregated system and dismissed the complaint only because he found the H.E.W. plan sufficient compliance with the Constitution (A. 14, 24).

Another reason given by the court for dismissal—that the board was proceeding to carry out the plan in good faith—reflects a misconception of the role of lower courts in supervising the desegregation process, see *supra*, pp. 14-16. The record describes the administration of the Gould system in detail sufficient to show that whether the board is acting in good faith or not, its performance is not such as to permit the lower courts to avoid supervision of the desegregation process.

By their opinions and dispositions the courts below also indicated that dismissal was strongly influenced by the fact that the United States Department of Health, Education, and Welfare had, in their view, controlling responsibility for supervising school desegregation in Gould because the district had adopted a plan to conform with Title VI of the Civil Rights Act of 1964. To be sure, H.E.W. Guidelines deserve weight as general propositions of school desegregation law, and as minimum standards for court-ordered desegregation plans. The same cannot be said for H.E.W. administrative approval of a particular school district's actual compliance with constitutional standards. With its limited personnel and funds, the Department is simply unable to ascertain all of the relevant facts about the performance of an individual school district in the way that a court hearing can do (especially where H.E.W. Guidelines do not even purport to regulate an issue in the case—the effect of construction policy on desegregation). Because of a shortage of resources, H.E.W.'s "compliance reviews and enforcement proceedings" are "not planned in a rational and consistent manner"; the Department's appraisal of desegregation is often "faulty and inefficient." "Manpower limitations" force the Department to fail to proceed against many districts which are not in compliance. See *Southern School Desegregation*, 1966-67, A Report of the U. S. Civil Rights Commission, July, 1967, pp. 58, 59; Note, *The Courts, H.E.W. and Southern School Desegregation*, 77 Yale L.J. 329, 347 (1967). Compare *Cypress* v. *Non-sectarian Hospital Association*, 375 F.2d 648, 658 659 (4th Cir. 1967) where a hospital defended a desegregation suit on grounds of H.E.W. approval, but the court, sitting en banc, ruled that H.E.W.'s compliance mechanism was so inefficient that it was not an equitable defense to a suit based on deprivation of constitutional rights. H.E.W. "necessarily concerns itself with every school district in

the country" so that to hold that "H.E.W. has preempted jurisdiction would relegate the courts to the purely appellate role of reviewing the particular treatment afforded a school district by the government." Note, 77 Yale L. J. 321, 323 (1967). The practical effect of such rule would be to reduce the rate of desegregation for H.E.W.'s enforcement difficulties are enormous. Unfortunately, the sorry statistics of southern school desegregation, see *infra* p. 36, reflect the inability of the Department to police, effectively, compliance with the Guidelines.

Dismissal of school desegregation cases on the ground that school boards are subject to H.E.W. jurisdiction is a step which would thwart efforts to secure compliance with *Brown* v. *Board of Education* for still another reason. H.E.W. depends on the courts to enunciate the substantive standards on which its Guidelines, and their enforcement, are based, "to chart the outer limits of Title VI and to enforce nondiscrimination in those areas Title VI is not broad enough to cover." [8] A recent study of judicial and administrative efforts to achieve desegregation put the matter clearly:

> "At least under present HEW policy, the Office of Education's ability to attack discrimination will only grow and evolve as the constitutional requirements themselves do, for the government is only attempting to impose the same conditions required by the Fourteenth Amendment. The result, of course, is that future changes in HEW standards to permit attacks on the worst examples of racial imbalance or the elimination of freedom of choice as a legitimate desegregation plan will only occur if courts hold such phenomena and practices unconstitutional. Until the courts strike down

[8] Note, 77 Yale L.J. 321, 329 (1967).

> the free choice plan, the Office of Education will not move, and once the court so holds, the Office of Education has no choice but to act accordingly."[9]

The facts of this case are an excellent illustration of the Department's need to rely on judicially determined standards. While the Guidelines recognize that it is the responsibility of a school system to adopt and implement a desegregation plan which will eliminate the dual school system, and all other forms of discrimination, as expeditiously as possible, they nowhere direct themselves to the effect of school construction policies on the achievement of this goal and do not supply standards against which such policies may be measured. Thus, the dismissal of the complaint in this case remitted Negro children and their parents to regulations which do not contain standards directed to an injury they claim and are unlikely to do so until such standards are judicially recognized.

Additional factors make compelling the conclusion that a district court may not refuse to supervise the desegregation process for this reason. The regulations drafted by H.E.W. pursuant to Title VI make compliance satisfactory if a school system is subject to a final order of a court of the United States, 45 C.F.R. §80.4(c)(1)(1967). This is clear recognition that the Department will not insist on standards different from those adopted by the courts.[10]

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[9] *Ibid.*

[10] That H.E.W. accepts free choice plans as establishing the eligibility of a district for federal aid does not of course mean that such plans are constitutional. For the available evidence indicates that H.E.W. has approved such plans, despite the massive evidence of their inability to disestablish the dual system, only because they have received approval in the courts, and it is felt inappropriate to enforce requirements more stringent than those imposed by the Fourteenth Amendment. See the materials collected in Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 Va. L. Rev. 42 (1967); Note, 77 Yale L.J. 321 (1967).

Indeed it has been universally recognized that the Guidelines were drafted in light of prevailing judicial standards, e.g. *United States* v. *Jefferson County Board of Education, supra,* 372 F.2d 847, 851. In such circumstances, dismissal in deference to H.E.W. would be to inhibit the growth of departmental standards. The courts would defer to H.E.W. and H.E.W. would defer to the courts. A dangerous circular pattern of negative, rather than positive, enforcement would be created.

Petitioners complained, moreover, of a violation of their constitutional rights; not statutory rights which they may have under Title VI of the Civil Rights Act which regulates the relationship between the federal government and its grantees. The courts may not abdicate their responsibility to confront the performance of school boards in terms of the constitutional standards of the Fourteenth Amendment. Petitioners have been unable to locate any decision which holds to the contrary. In this regard, the courts below fundamentally misconstrued the rule of burden of proof in school desegregation cases. The burden of proof is not on Negro students to demonstrate that a school system which undisputedly has been segregated for generations (and which still maintains one of its two school plants as all-Negro) is still segregated, but on the school board to demonstrate that its desegregation plan desegregates the system, *Brown* v. *Board of Education, supra.* That burden is not carried solely by adoption of a "choice" plan when another plan which apparently is reasonable and practical will immediately desegregate the system.

B. Use of One School for Elementary Grades and the Other for Secondary Grades Is a Reasonable Alternative to a "Choice" Plan Which Will Disestablish the Dual System.

Petitioners do not ask this Court to order grade consolidation in this district but to consider the standard under which such an order by the district court would be appropriate. We believe that the proper course for this Court to follow is to vacate the judgment in order that the feasibility of consolidation may be determined in the courts below, with instructions to order such relief, if not impractical, because it will more speedily disestablish the dual system. We restrict ourselves, therefore, to a showing that (1) such utilization is shown by this record to be a sufficiently workable and attractive method of administering the system for the lower courts to be required to consider it on the merits, *infra* pp. 23-27, and (2) that the "freedom of choice" plan presently in operation is incapable of disestablishing segregation, *infra* pp. 27-38.

Because there are only two nearby schools in this small district, there is a clear choice between a system composed of reasonably-sized, integrated, elementary and secondary schools, or a system composed of two inefficiently-small, combination elementary and secondary schools. The superintendent's concession that under the "choice" plan the replaced Negro school would probably continue to be all-Negro, actual experience under the plan, as well as the obvious educational inefficiency and undesirability of the dual schools constitute a reasonable basis for providing that one site shall be used for an elementary school and the other site for a secondary school. (The dual school system might also be completely eliminated with a minimum of administrative difficulty in this district, where both races reside throughout, by a geographic assignment

plan, but such a plan would not end the manifest inefficiency of operating two small schools serving grades 1-12.) The system's school buildings as constructed are adaptable to changed usages and whatever additional cost might be involved in alteration, as the court of appeals recognized, is reasonably balanced against the continued extra operating cost of the inefficient dual system (A. 147).

The school facilities of the district ideally lend themselves to a plan of consolidation, which is, as recongized by the H.E.W. Guidelines and court decisions, an appropriate method of disestablishment:

> In some cases, the most expeditious means of desegregation is to close the schools originally established for students of one race, particularly where they are small and inadequate, and to assign all the students and teachers to desegregated schools. Another appropriate method is to reorganize the grade structure of schools originally established for students of different races so that these schools are fully utilized, on a desegregated basis, although each school contains fewer grades. (45 CFR §181.11)

See *Dowell* v. *School Board of Oklahoma City, supra.* Until 1967, the traditionally white Gould High School was the most modern facility in the district, having been completed in 1964 (A. 89). The immediately adjacent Gould Elementary School was originally constructed for use as a high school, and was subsequently converted to an elementary school (A. 81-82). If the Gould Elementary School were converted back to use as a secondary school, the Gould site would be clearly suitable for all the secondary students in the district (A. 145). The 1966-67 secondary enrollment

of the district was 360 for grades 8-12, while the total enrollment at the Gould School was 375 (grades 1-12).[11]

The all-Negro Field Elementary School is also a modern facility, constructed in 1954 with subsequent additions (A. 89-91). The gymnasium is adequate for both the present number of Negro elementary and Negro high school students, so that it would also be suitable for use by all of the elementary students in the system. The new building constructed by the system for use as the Negro high school is adjacent to the Field Elementary School, and can easily be furnished as an addition to the elementary school—which would make the combined Field School adequate for all of the elementary students in the district. The enrollment for the district in 1966-67 was 492 for grades 1-7, while the total enrollment at the Field School was 477 (grades 1-12).[12]

If there is some impediment to consolidation which the record does not reveal, the board should have the opportunity, on remand, to prove it, but absent some serious educational or practical deficiency in such a course, the board should not be permitted to reject it in favor of an assignment system which does not disestablish the dual system. For unless the board is required to cease maintaining dual facilities, a predominantly segregated school system will be fastened upon the community for at least another generation, and all students—Negro and white—will continue to pay the price of the inefficiency caused by operating a dual system in such a small district. This is graphically illustrated by the disparity in course offerings at the two high schools. If all students were attending the same high school, everyone would have the opportunity

[11] See footnote 1, *supra*.

[12] *Ibid.*

to take courses such as journalism or agriculture, as well as other courses which would be available because a higher total of students would elect them. Negroes who have no football or track programs would be able to participate in those sports. The basic sciences, chemistry and biology, are offered only in alternate years at Gould while they are offered every year at Field. There is no Future Farmers of America Program at Field only because no agriculture course is offered. In a consolidated system, all students would have the opportunity to take each of these courses every year.

The sad fact is that the board's failure to consolidate grades not only perpetuates segregation but deprives both Negroes and whites of significant educational opportunities. To be sure, the Fourteenth Amendment may not require that school administrators operate their system in the most efficient manner, but their failure to do so, without explanation, demonstrates the racial purpose of the "choice" assignment plan, *infra*, pp. 27-38.[13] It is no accident that the board ignores the recommendations of the most important study of secondary education that has been made in this country, James Bryant Conant's, *The American High School Today* (1959) which gives highest priority in educational planning to the elimination of small high schools with graduating classes of less than one hundred.[14]

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[13] A similar inference was made in *Kelley* v. *Altheimer*, 378 F.2d 468 (8th Cir. 1967). There the school board added additional classrooms at each of two complexes, one traditionally maintained for Negroes the other for whites:

> We conclude that the construction of the new classroom buildings had the effect of helping to perpetuate a segregated school system and should not have been permitted by the lower court.

[14] "The enrollment of many American public high schools is too small to allow a diversified curriculum except at exorbitant expense . . . The prevalence of such high schools—those with graduating classes of less than one hundred students—constitutes one of the serious obstacles to

See *Moses* v. *Washington Parish School Board*, — F. Supp. — (E.D. La., Oct. 19, 1967) ("Free choice" plan "wasteful in every respect"; geographic zones ordered).

The court of appeals recognized that there is substantial evidence that consolidation is a feasible alternative to "freedom of choice" when it found that "there is no showing that the Field facilities with the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school *when the appropriate time for such a course arrives.* We note that the building now occupied by the predominantly white grade school had originally been built to house the Gould High School" (emphasis supplied) (A. 145). Given the apparent feasibility of grade consolidation and the deficiencies of a "choice" plan in this district, see *infra* pp. 33-35, the court of appeals had an obligation to fashion a remedy equal to the task of disestablishing the dual structure. Instead, it erroneously affirmed dismissal of the complaint.

C. Freedom of Choice Is Incapable of Disestablishing Segregation in the Gould School District.

The duty of the school board was to convert the dual school system it had created into a unitary non-racial system. Although it had an alternative which would have disestablished the dual system immediately, and with less educational inefficiency, the board adopted a method whose

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good secondary education throughout most of the United States. I believe such schools are not in a position to provide a satisfactory education for any group of their students—the academically talented, the vocationally oriented, or the slow reader. The instructional program is neither sufficiently broad nor sufficiently challenging. A small high school cannot by its very nature offer a comprehensive curriculum. Furthermore, such a school uses uneconomically the time and efforts of administrators, teachers, and specialists, the shortage of whom is a serious national problem" (p. 76).

success depended on the ability of Negroes to unshackle themselves from the psychological effects of the dual system of the past, and to withstand the fear and intimidation of the present and future. Only the "choice" plan selected by the board subjects Negroes to the possibility of intimidation or gives undue weight to the very psychological effects of the dual system that this Court found unconstitutional in *Brown* v. *Board of Education*. Nor did the board introduce evidence to justify adoption of a method, 11 years after *Brown*, which if it could disestablish the dual system at all, would require a much longer period of time than available alternatives. The failure of the board to show the existence of any administrative reasons, such as this Court contemplated in *Brown II* might justify delay, made it error for the courts below to abdicate to an administratively supervised "choice" plan.

After *Brown*, southern school boards were faced with the problem of "effectuating a transition to a racially nondiscriminatory system" (*Brown II* at 301). The easiest method, administratively, was to convert the dual attendance zones into single attendance zones, without regard to race, so that assignment of all students would depend only on proximity and convenience.[15] With rare exception, however, southern school boards, when finally forced to begin desegregation, rejected this relatively simple method in favor of the complex and discriminatory procedures of pupil placement laws and, when those were invalidated, switched to what has in practice worked the same way—the so-called free choice.[16]

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[15] Indeed, it was to this method that this Court alluded in Brown II when it stated "[t]o that end, the courts may consider problems related to administration arising from revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis" (349 U.S. at 300-301).

[16] According to the Civil Rights Commission, the vast majority of school districts in the south use freedom of choice plans. See *Southern School*

Under so-called free choice students are allowed to attend the school of their choice. Most often they are permitted to choose any school in the system. In some areas, they are permitted to choose only either the previously all-Negro or previously all-white school in a limited geographic area. Not only are such plans more difficult to administer (choice forms have to be processed and standards developed for passing on them, with provision for notice of the right to choose and for dealing with students who fail to exercise a choice),[17] they are, in addition,—as experience dem-

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Desegregation, 1966-67, A Report of the U. S. Commission on Civil Rights, July, 1967. The report states, at pp. 45-46:

> Free choice plans are favored overwhelmingly by the 1787 school districts desegregating under voluntary plans. All such districts . . . in Alabama, Mississippi, and South Carolina, without exception, and 83% of such districts in Georgia have adopted free choice plans. . . .

[17] Section II of the decree appended by the United States Court of Appeals for the Fifth Circuit, to its recent decision in *United States* v. *Jefferson County Board of Education, supra*, shows the complexity of such plans. That court had previously described such plans as a "haphazard basis" for the administration of schools. *Singleton* v. *Jackson Municipal Separate School District*, 355 F.2d 865, 871 (5th Cir. 1966).

Under such plans school officials are required to mail (or deliver by way of the students) letters to the parents informing them of their rights to choose within a designated period, compile and analyze the forms returned, grant and deny choices, notify students of the action taken and assign students failing to choose to the schools nearest their homes. Virtually each step of the procedure, from the initial letter to the assignment of students failing to choose, provides an opportunity for individuals hostile to desegregation to forestall its progress, either by deliberate misperformance or non-performance. The Civil Rights Commission has reported on non-complaince by school authorities with their desegregation plans:

> In Webster County, Mississippi, school officials assigned on a racial basis about 200 white and Negro students whose freedom of choice forms had not been returned to the school office, even though the desegregation plan stated that it was mandatory for parents to exercise a choice and that assignments would be based on that choice [footnote omitted]. In McCarty, Missouri after the school board had

onstrates (*infra* pp. 33, 36)—far less likely to disestablish the dual system.

Under "choice" plans, the extent of actual desegregation varies directly with the number of students seeking, and actually being permitted, to transfer to schools previously maintained for the other race. It should have been obvious, however, that white students—in view of general notions of Negro inferiority and the hard fact that far too often Negro schools are vastly inferior to those furnished whites see *supra* pp. 6-8—would not transfer to formerly Negro schools; and, indeed, very few have.[18] From the beginning the burden of disestablishing the dual system under free choice was thrust upon Negro children and their parents, despite this Court's admonition in *Brown II* (349 U.S. 294, 299) that "school authorities had the primary responsibility."

The notion that the making available of an unrestricted choice satisfies the Constitution, quite apart from whether significant numbers of white students choose Negro schools or Negro students white schools, is, we submit, funda-

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distributed freedom of choice forms and students had filled out and returned the forms, the board ignored them.

Survey of School Desegregation in the Southern and Border States, 1965-1966, at p. 47. Given the other shortcomings of free choice plans, there is serious doubt whether the constitutional duty to effect a nonracial system is satisfied by the promulgation of rules so susceptible of manipulation by hostile school officials. As Judge Sobeloff has observed:

> A procedure which might well succeed under sympathetic administration could prove woefully inadequate in an antagonistic environment.

Bradley v. *School Board of the City of Richmond*, 345 F.2d 310 (4th Cir. 1965) (concurring in part and dissenting in part).

[18] "During the past school year, as in previous years, white students rarely chose to attend Negro schools." *Southern School Desegregation*, 1966-67 at p. 142; *United States* v. *Jefferson County Board of Education*, *supra*, 372 F.2d at 889.

mentally inconsistent with the decisions of this Court in *Brown I* and *II*; *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Bradley* v. *School Board of the City of Richmond*, *supra*, and the entire series of cases it has decided.[19] *Brown* contemplates complete reorganization. It condemns not only compulsory racial assignments of public school students, but also the maintenance of a dual public school system based on race—where some schools are maintained or identifiable as being for Negroes or others for whites. It presupposed a major reorganization of the educational systems of the affected states, the extent of which is suggested by the fact that the court took an additional year to consider the problem of relief. The direction in *Brown II*, to the district courts that they might consider

> problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems (349 U.S. at 300-301)

amply demonstrates the magnitude and thoroughness of the reorganization envisaged.

If this Court in *Brown I* and *II* had thought that a "racially non-discriminatory system" would be achieved although Negro and white students would continue as before to attend schools designated for their race, none of the quoted language was necessary. It would have been suffi-

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[19] See *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Calhoun* v. *Latimer*, 377 U.S. 263 (1964); *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Goss* v. *Board of Education*, 373 U.S. 683 (1963).

cient merely to say "compulsory racial assignment shall cease." But the Court did not stop there. Rather it ordered a pervasive reorganization so that the system would be transformed into one that was "unitary and nonracial," one in which schools would no longer be identifiable as being for Negroes or whites. That students have been permitted to choose a school does not destroy the racial identification of that school if it continues to serve students of one race, is staffed solely by teachers of that race, or is treated as a Negro or white school by school officials. The only way racial identifications—consciously imposed by the state during the era of enforced segregation—can be erased is by having schools serve students of both races, through teachers of both races. This is what we think disestablishment of the dual system means and this is what we submit the *Brown* decisions require.

Given the premise of *Brown* v. *Board of Education*—that segregation in public education had very deep and long term effects upon Negroes—it is not surprising that individuals, reared in that system and schooled in the ways of subservience (by segregation in schools and every other conceivable aspect of existence) who are given the opportunity to "make a choice," chose, by inaction, that their children remain in Negro schools.[20] By making the Negro's exercise of choice the critical factor, school authorities have

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[20] In its *Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964* (referred to as the Guidelines), the Department of Health, Education, and Welfare states (45 CFR §181.54):

> A free choice plan tends to place the burden of desegregation on Negro or other minority group students and their parents. Even when school authorities undertake good faith efforts to assure its fair operation, *the very nature of a free choice plan and the effect of longstanding community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students.* (Emphasis added.)

insured desegregation's failure. Moreover, intimidation, a weapon well-known throughout the south, has been employed to deter transfers. Every community pressure militates against the affirmative choice of white schools by Negro parents. Here the heavy hand of segregation did its work in overt fashion.

First, *"the only school desegregation plan that meets constitutional standards is one that works"* (*United States* v. *Jefferson County Board of Education, supra,* 372 F.2d at p. 847 (emphasis in original)) and the Gould plan has not worked. In both first and second year of its operation only about 70 Negro pupils attended the white school and no whites "chose" to attend the Negro school. The number seems to have climbed only slightly in the 1967-68 school year.[21] In the first year of the plan several Negroes "chose" the white school but were refused admission due to overcrowding, an overcrowding caused in part by the fact that no whites "chose" to attend the Negro school. Only one teacher has been assigned to a desegregated faculty, and that teacher on a part time basis. No Negro teacher has been assigned to teach at the white school. In short, fourteen years after *Brown*, "freedom of choice" has not and does not appear capable of disestablishing segregation.

Second, the record shows active intimidation of the Negro community. The PTA of the Negro school was prohibited by the superintendent from meeting at the school once it began to protest conditions there, and an injunction was obtained by the board of education against public protests concerning school conditions (A. 63-64).

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[21] In June, 1967, the superintendent informed the Department of Health, Education and Welfare that he anticipated an increase of only 14 Negro students in the white school for the 1967-68 school year, the third year of desegregation and that again no whites would attend the Negro school, see note 1, *supra.*

Third, the degree of inequality between the Negro and white high schools which has been maintained for so long has inevitably communicated to the Negro community that the board could not be trusted to administer a "freedom of choice" plan fairly, and that the choice offered was not really free. Until 1965, the Negro high school had such a poor physical plant and program that it was completely unaccredited by the State of Arkansas, while the white high school had an "A" rating (A. 10, 16, 31, 83, 130). Long promised reconstruction took place only after adoption of a desegregation plan (itself required to obtain federal funds) when a new school would have the possible effect of limiting the number of Negro transferees under the choice plan. Not only has the practice of segregation followed by this district been unconstitutional since 1954, but the "gross inferiority" of the separate public school facilities provided for Negro students has been unconstitutional at least since 1938, *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337; *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950). The court of appeals erred, fundamentally, in ignoring the relevance of these historic inequalities to the validity of the choice plan and the need to explore alternate methods of disestablishment.

Fourth, the character of the new replacement construction on the traditional segregated site (and that no rational educational purpose is apparent behind such dual construction) is not susceptible to any other interpretation by the community, Negro *and* white, than that the board wishes to maintain a segregated system, with one school intended for whites and the other intended for Negroes, cf. *Kelley* v. *Altheimer,* 378 F.2d 483, 490, 496 (8th Cir. 1967). This was just as unambiguous an act as re-writing the word "white" over the door of the Gould School and the word "Negro" over the door of the Field School—and

is just as coercive to Negroes who have traditionally been informed by the segregated system that they were not wanted in "white" institutions, and to whites who have been informed that it was not proper for them to be in "Negro" institutions. The replacement construction here has precisely the same effect on the "freedom" in a "freedom of choice" plan as does the maintenance of all-white and all-Negro faculties at various schools in a system. *Cf. Bradley* v. *School Board of the City of Richmond*, 382 U.S. 103 (1965); *Kier* v. *County School Board of Augusta Co., Va.*, 249 F. Supp. 239, 246 (W. D. Va., 1966).

Fifth, the integration of faculty is a factor absolutely fundamental to the success of a desegregation plan, for a school with a Negro or white faculty will always be a Negro or white school. Nevertheless, the Board has not assigned Negro teachers to regular teaching at the traditionally white school, and only one white to part time duties at the traditionally, and still, all-Negro school (A. 67-70; see note 1, *supra*). There are no plans for substantial desegregation in the future (A. 68-69).[22] Compare the panel's indifference to the faculty issue with the treatment accorded the issue in the decision of another Eighth Circuit panel in *Kelley* v. *Altheimer*, 378 F.2d 483, 491 (1967).

With rare exception school officials adopt, and the lower courts condone, free choice knowing full well that it will produce less Negro students in white schools, and less injury to white sensibilities than under consolidation, geographic attendance zone, or other available methods. These expectations are justified. Meaningful desegregation has

[22] The failure of the board to take meaningful steps to integrate its faculty is consistent with what the record shows: that the board, by adopting freedom of choice, could not in good faith have believed or intended that the dual system would thereby be converted into the nonracial system required by the Constitution.

not resulted from the use of free choice. Even when Negroes have transferred, however, desegregation has been a one-way street—a few Negroes moving into the white schools, but no whites transferring to the Negro schools. In most districts, therefore, as in the case before the Court, the vast majority of Negro pupils continue to attend school only with Negroes. Although the proportion of Negroes in all-Negroes schools has declined since *Brown*, more Negro children are now attending such schools than in 1954.[23] Indeed, during the 1966-67 school year, a full 12 years after Brown, more than 90% of the almost 3 million Negro pupils in the 11 Southern states still attended schools which were over 95% Negro and 83.1% were in school which were 100% Negro.[24] "This June, the vast majority of Negro children in the South who entered the first grade in 1955, the year after the Brown decision, were graduated from high school without ever attending a single class with a single white student."[25] As the Fifth Circuit has said, "[f]or all but a handful of Negro members of the High School Class of 1966, this right [to equal educational opportunities with white children in a racially non-discriminatory public school system] has been of such stuff as dreams are made on."[26] And in its most recent report, the Civil Rights Commission states:

> The review of desegregation under freedom of choice plans contained in this report, and that presented in last years commission's survey of southern school desegregation, show that *the freedom of choice plan*

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[23] *Southern School Desegregation*, 1966-67, at p. 11.

[24] *Id.* at 165.

[25] *Id.* at 147.

[26] *United States* v. *Jefferson County Board of Education*, *supra*, 372 F.2d at 845.

> *is inadequate in the great majority of cases as an instrument for disestablishing a dual school system.* Such plans have not resulted in desegregation of Negro schools and therefore perpetuate one-half of the dual school system virtually intact. (Emphasis added.)[27]

Petitioners submit that a freedom of choice plan is constitutionally unacceptable where as in this case, there are other methods, educationally feasible and no more difficult to administer, which would more speedily disestablish the dual system.

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[27] *Southern School Desegregation*, 1966-1967, pp. 152-153. In an earlier report, *Racial Isolation in the Public Schools*, 1967, the Civil Rights Commission observed (at p. 69) that, ". . . the degree of school segregation in these free-choice systems remain high," and concluded that (*ibid*): "only limited school desegregation has been achieved under free choice plans in Southern and Border city school systems."

CONCLUSION

WHEREFORE, petitioners pray that the judgment below be vacated and the cause remanded for appropriate proceedings.

Respectfully submitted,

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UPREME COURT, U. S.

MAR 21 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 805.

ARTHUR LEE RANEY, et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT,
a Public Body Corporate, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit.

BRIEF FOR RESPONDENTS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 805.

ARTHUR LEE RANEY, et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT,
a Public Body Corporate, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit.

BRIEF FOR RESPONDENTS.

QUESTIONS PRESENTED.

The first Question Presented as stated by petitioners is:

> 1. Whether the court of appeals erred in denying all relief, dismissing the complaint, and declining to order the district court to supervise the desegregation process on the ground that the school board was acting in good faith and the Department of Health, Education and Welfare had initially approved the board's plan as facially sufficient to comply with Title VI of the Civil Rights Act of 1964.

The court of appeals affirmed dismissal of the complaint by the district court based on the finding by both courts that petitioners had failed to sustain the burden of proof

on the issues joined in, and tried by, the district court, and the finding by both courts (on substantial evidence), that respondents were proceeding in good faith to desegregate the district.

The petitioners set out the second Question Presented as follows:

> 2. Whether—13 years after **Brown v. Board of Education,**—a "choice" plan which maintains an all-Negro school is constitutional in a system with only two nearby school plants, one traditionally Negro and the other traditionally white, although assigning elementary grades to one school and secondary grades to the other is a feasible alternative assignment method which would immediately desegregate the system.

This question was not raised in the district court. The issue tried in that court was whether it could and should require a proposed school building to be built on a particular site because of the effect of such construction on the desegregation of the school district (A. 21). It decided it could do so, but that the evidence did not warrant such action in this instance (A. 24).

The court of appeals rejected the argument of these petitioners that it should order a redistribution of students within the school system, specifying what grades should be taught at each school, because that question (like the one petitioners seek to present here) was raised for the first time on appeal (A. 144). Therefore there is no factual basis in this record for the assumption incorporated in this question that the redistribution of students proposed by petitioners "is a feasible alternative assignment method."

CONSTITUTIONAL PROVISION INVOLVED.

This case involves Section I of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT.

In this suit a small and impoverished rural school district has been required to defend against a different challenge to the conduct of its educational program at every phase of the litigation. When the suit was filed in September, 1965, the principal charge was that the high school attended only by Negroes was inadequate and should be improved (A. 6-7). When the case was tried in November, 1965, the claim was that the proposed building to replace this admittedly inadequate high school should be built on a site other than the one selected by the school authorities.[1] In the court of appeals petitioners sought a comprehensive redistribution of the students and reorganization of the school system. That court said (A. 144):

> "Upon appeal, plaintiffs again altered their position and urged that the Board be restrained from using the new building construction as a replacement for the Field High School and that instead, the building be converted into a unit of a completely integrated grade school. The issue last stated is raised for the first time upon appeal and was not presented to the trial court and no opportunity was afforded the parties to offer evidence on the feasibility of such a

[1] Illustrating that this was the only issue petitioners undertook to present to the district court is the first paragraph of their trial memorandum presented about three weeks after the trial:

> "Plaintiffs respectfully submit the following Memorandum on the issue of whether the Court has authority to direct defendant Board of Education of the Gould School District No. 1 to locate and construct new school facilities which the Board proposes to construct in a way to encourage, rather than discourage, school desegregation. The issue, more simply put, is can, or perhaps should, the Court order the Gould school district to build its proposed new high school facilities on one particular site rather than another."

plan, nor was the trial court given any opportunity to pass thereon. It is fundamental that issues not presented to or considered by the trial court cannot be considered on appeal."

In this Court petitioners now acknowledge that there is no factual basis in the record for the relief they sought in the court of appeals, and ask that the case be remanded "in order that the feasibility" of their proposed reorganization of the school system can be tried in the courts below (p. 23).

Petitioners have claimed that every stage of the proceedings that respondents are so hostile to Negroes that they can not be trusted to perform their duties and that the federal courts must therefore exercise the administrative discretion that is vested by law in the local authorities. Their position in the court of appeals was set out in this language at page 19 of their brief filed there:

> "The degree of inequality between Negro and white high schools which has been maintained by the Gould School District since 1954, despite a court judgment requiring their equalization, suggests that the board is so totally committed to victimizing the Negro community that it could not be expected to administer a 'freedom of choice' plan fairly even under a court order."

In response to this extravagant claim the court of appeals concluded:

> "The record fairly shows that the integration plan has operated smoothly and that the Negro students have been encouraged to elect the white school" (A. 150).
>
> • • • • • • •
>
> "Additionally, we find no substantial evidence to support the finding that the Board was not proceeding to carry out the plan in good faith" (A. 151).

Examination of the record clearly reveals why the courts below agreed that respondents had demonstrated their good faith commitment to discharge their legal obligations and that there was no reason to impose the further burden of perpetual litigation on a school district already severely hampered by insufficient funds.

This is a small rural school district with a ratio of about two Negro students for each white student (A. 80). The economy is primarily agricultural, and there is no industry in the district (A. 78). The Arkansas State Penitentiary lies wholly within the district, and removes some twenty thousand acres from the ad valorem tax base (A. 78). The cumulative result of these factors is that the district has grossly inadequate revenues to the extent that in the five or six years before the trial the district ended the year with an operating deficit (A. 98).

The building housing Gould Elementary School was originally built in 1947 at a cost of $81,950 as a high school, and the building housing Gould High School was erected in 1964 with proceeds from insurance policies when the existing building burned. The insurance proceeds were about $98,000 and were entirely exhausted by the new building (A. 82-3). These buildings, and the other buildings on this site used for school purposes, are marked with many inadequacies when measured by any contemporary standard (A. 82-88).

The Field Elementary School was built in 1954 at a cost of $45,700, a gymnasium and auditorium was added in 1960 for $82,400 and two additional classrooms were added in 1965 for $9,700 (A. 89-90). This is an entirely satisfactory educational facility (A. 91).

The Field High School concerning which complaint was made was conceded by respondents to be an inadequate structure, and it has been planned to replace it as soon as funds for that purpose were available. At the time of trial

it was expected that within the legal restrictions on the district's bonded indebtedness construction on the new high school could begin in 1967 and the building could be ready for occupancy in the Fall of 1967 (A. 65).[2]

Petitioners suggest that for many years prior to the completion of the construction program that culminated with the replacement of Field High School respondents intentionally maintained unequal facilities for the Negro students. In this connection it is noted that all of the construction funds expended by the district since 1954 have been on facilities used exclusively by Negro students except the insurance proceeds with which a burned building on the Gould School campus was replaced, and further that at the time of the trial all of the construction money to become available in the foreseeable future was earmarked for like use.

The date 1954 is referred to by petitioners in connection with their claim of unequal facilities because they seek to charge that respondents have been subject to a court order "in a suit to require equal facilities for Negroes" since that date. Petitioners' brief, p. 5. There is no proof whatever of this. The Superintendent knew nothing of any prior suit, and found nothing relating to such a suit in the district's records (A. 107-8). The president of the school board, who with eight years on the board was the senior member in point of service, knew nothing about such a suit (A. 121). A witness on behalf of plaintiffs gave an unintelligible answer about her knowledge of such a suit (A. 131), and no judgment or court order was ever introduced.

The president of the board fairly summarized the facts in the record pertaining to the physical plant in his testi-

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[2] During the long pendency of this litigation the new building was constructed on the time schedule that respondents projected during the trial. Petitioners' brief, p. 5.

mony that when the proposed high school building on the Field campus was constructed that facility for grades one through twelve would be more modern and far superior to that on the Gould campus (A. 125-6). This issue concerning the physical facilities was the central one at the trial, and the vast majority of proof on both sides was directed to it. The unimpeachable decision of the district court on it was:

> "Therefore, it appears that the defendant school board realized the need for a new school building and is doing all that it is financially able to do toward filling this need" (A. 17).

The respondents' good faith is not demonstrated alone by the application of all available construction funds since 1954 for the modernization of the physical plant used by Negro students. This district moved promptly to comply with the Civil Rights Act of 1964, and in a display of utmost good faith submitted a desegregation plan to H. E. W. providing for a much more rapid rate of desegregation than was required by the Regulations of that Department. Unlike most school districts of the South, the majority of which chose to desegregate over a period of 3 years (as they had a right to do under the Regulations) this district elected to fully desegregate all twelve grades the first year.

The exercise of free choice by Negro students resulted in overcrowding three grades at the Gould campus. When this occurred, respondents sought counsel from H. E. W. which suggested limiting the number of Negro students whose choices would be honored in the overcrowded grades (5, 10 and 11) to the physical capacity of the facility for 1965-66 only (A. 53-5). Respondents, acting on that advice, honored all requests for assignment in the nine other grades, and honored twelve such requests for the overcrowded grades. This resulted in rejecting, for the

1965-66 school year alone, the choice of assignment of a total of 28 children in grades 5, 10 and 11 (A. 95).

The resulting assignments placed 71 Negro students with 299 white students at the previously all white school (A. 79-80). The record reflects the success of the respondents' plan of desegregation. The Negro students were accepted as members of the Gould school's athletic teams (A. 99-100), and several in each class earned enrollment on the honor roll (A. 100).[3]

The Board president summarizes the success of the desegregation plan in operation (A. 123):

> "Q. As far as the educational programs' conduct on the school properties in the District, has the plan proceeded satisfactorily? A. We have had wonderful cooperation out of the white people and the colored people. I'd say that we have got ninety-five percent of the cooperation out of both sides. And the Board as a whole—if I might elaborate just a little—has gone out of our way in going to athletics—not just the Board, but all the people, to go to our athletic program, or any social functions and to discourage any violence or any nagging, or anything of that nature, not only with the white patrons, but the colored patrons, we've had wonderful cooperation. We've got a small minority that's not interested in our schools or our people or our economy or our welfare that don't even have kids. We haven't had any trouble out of people that's got kid's that's going to school—colored or white. We've had wonderful cooperation out of them."

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[3] This fact is also significant on the general but unsupported claim that respondents had afforded inferior educational opportunities to the Negro students. If such had been the case they would not have been able to compete so well on entering the previously all white school.

That the board voluntarily chose to desegregate in one year instead of three (and the testimony of the Superintendent (A. 102) and of the president (A. 122) pertaining to why it did so), and that the program was immensely successful, although it challenged traditions and customs of well over a century is persuasive rebuttal to the unsupported assertion of petitioners that these people are bent on "victimizing" the Negro community.

It would unduly enlarge this brief to discuss each alleged disparity between the schools mentioned by petitioners. It was established at the trial that respondents were already using all available funds to correct the genuine deficiencies, i. e. to replace Field High School and to eliminate differences in teacher salary scales. Virtually all of the other differences between the various schools in the district simply reflect that it is impossible to maintain any two schools so they are identical in every respect. Moreover, many of the differences such as broader curriculum offerings (A. 53) and better academic credentials of teachers (A. 94-5) place the advantage at the Field schools, not those that were previously attended only by white students.

However several of the claims made by petitioners do require response. They assert that it was "the practice to require Negro students to pick cotton in the fields during class time to earn money for school fund raising projects, and to pay enrollment fees." Petitioners' brief, p. 7. The proof in the record affords no basis for the evil and ulterior overtones with which the respondents clothe the cotton picking practice. Superintendent Sage testified (A. 98-9):

> "Q. This cotton-picking situation has been mentioned, Mr. Sage, would you tell the Court what you know about the cotton-picking situation? A. As long as I can remember, it has been the custom at each

school, the Gould as well as the Field School, for different classes to have fund-raising projects to buy something for the use of the class, and they have money-raising activities for those purposes and I assume that this cotton-picking is one of the ways that the students at the Field High used to raise money for their classes.

Q. Is that a type of project—that is cotton-picking—that has been employed by the students at the Gould high school? A. Yes.

Q. Do they do that during school hours or on Saturdays and after school? A. On Saturdays and after school.

Q. Are there other similar projects some classes use instead of cotton-picking for money? A. Yes, car washes.

Q. Let me ask you this, is this a voluntary program whenever a class wants to do it, or is it mandatory? A. It's voluntary."

The withdrawal of permission to hold P. T. A. meetings on the Fields school property, and obtaining an injunction against "protesting" by respondents are cited as evidence of their hostility to Negroes. This is discussed under the caption "Intimidation" in petitioners' brief, pp. 9-10.

Irresponsible charges of intimidation were also made in the complaint, and in a motion for a preliminary injunction (not printed in the record—see docket entries A. 1). When the time came for proof on these allegations, plaintiffs dismissed their suit against the accused Chief of Police (A. 28), and then abandoned the announced intent to call witnesses to such charges against the school administrative staff (A. 120).

The P. T. A. matter arose when that organization was taken over by non-members (A. 116), undertook to

carry out political objectives (A. 101), and sponsored public demonstrations including picketing of the Federal Building at Little Rock (A. 108-9). No other group is permitted to use school property for political rallies (A. 101), and respondents are certainly in the proper discharge of their duties to deny such use to any organization even if it calls itself a P. T. A.

As to the injunction obtained in a suit brought by some of the respondents to restrain what petitioners characterize innocently as "protesting", the record shows that its reach was to stop "mass demonstrations or picketing in the vicinity of Gould High School" (A. 63). Certainly no unfavorable conclusion can be drawn concerning the motives of public officers charged with the operation of a school system because they resort to the courts to preserve the public peace around the school property.

Perhaps the best illustration in the testimony of the genuine concern of the respondents for the welfare of all the students in the district, and the complete absence of the racial hostility suggested by petitioners, is the testimony of the Negro principal of Fields school (A. 118):

> "Q. In that capacity, have you had occasion to work regularly with Mr. Sage and with the members of the Gould School Board? A. I have.
>
> Q. Have you found them interested in, and cooperative with, the program you had in your schools? A. One hundred percent.
>
> Q. Have you found them willing to donate personally from their own pockets for the projects you had in those schools? A. Yes, sir.
>
> Q. Every one of them? A. Every one."

The record fairly reflects that respondents voluntarily initiated a desegregation plan in 1965. Except for a few

students whose right to choose their school was delayed for one year due to overcrowding, every student in the district was given the unrestricted right to select his school.[4] We will demonstrate that the method of school assignment selected by respondents not only protects the constitutional rights of all concerned, but also that it is the method best calculated to preserve the educational integrity of the school system in this district.

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[4] The record does not reflect the operation of the plan in years subsequent to 1965. However, petitioners have placed before the Court considerable data concerning such operations (Petitioners' brief, pp. 4-5) and we suggest that the Court can safely conclude that the unrestricted annual choice provided for all students by the plan has, in fact, been honored or petitioners would certainly have included that information along with their other materials from sources outside of the record.

SUMMARY OF ARGUMENT.

I. Both of the courts below found that the defendants were discharging their constitutional obligations in good faith, and that they were already administering a constitutionally adequate desegregation plan at the time suit was brought. In view of these findings the district court correctly dismissed the complaint. That court had no obligation to retain the case on its docket to supervise the operation of this school district in perpetuity. This Court's direction that the district courts retain jurisdiction in the cases being remanded in **Brown v. Board of Education**, 349 U. S. 294, does not suggest such a procedure in every case involving school desegregation. It implied only that the district courts would retain such cases for so long as the circumstances indicate a need for judicial supervision. In cases like this one where the circumstances make appropriate a final judgment then **Brown** does not inhibit that disposition.

II. Although it presents an issue not presented to, or decided by, the courts below, we will discuss the issue raised by the second Question Presented by petitioners. That question is whether a freedom of choice method of student assignment is constitutionally permissible if the choices made pursuant to it do not result in some sort of balance in the racial composition in each school.

A. This Court has never held that public officials have a constitutional duty to mix or balance the races in the public schools. **Brown** condemned only state-enforced racial segregation. This Court's subsequent decisions reaffirm that principle, but give no support to the proposition that the Constitution requires school authorities to manipulate assignments in order to maximize racial mixing.

B. In carefully reasoned opinions the lower federal courts have been virtually unanimous in concluding that while the Constitution prohibits racial discrimination in school assignment, it does not command integration. It simply condemns race as a criterion for school assignment. The court of appeals of every circuit where there has been significant litigation pertaining to school desegregation, including the First, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits, has so construed the Constitution and **Brown**. The recent decision of the Court of Appeals for the Fifth Circuit[5] overruling a long line of its own decisions is demonstrably in error. It rests on the unsound assumption that the Civil Rights Act of 1964 and the desegregation guidelines thereafter published by H. E. W. enlarged the Fourteenth Amendment's prohibition against state-imposed racial discrimination. To the contrary, however, the Act adopted as national policy prior court decisions squarely holding that state authorities are under no duty to achieve racial balances, or alter racial imbalances, in the schools, and the so-called guidelines are valueless as aids to a court in construing the Constitution.

C. Both the express language and legislative history of the Civil Rights Act of 1964 make it clear that it created no duty to racially balance the public schools, or to alter racial imbalances. It was the express intent of Congress to adopt, and thus confirm as national policy, the interpretation of the Constitution in **Bell v. School City of Gary, Ind.**, 214 F. Supp. 819 (N. D. Ind., 1963), aff'd. 324 F. 2d 209 (7 Cir., 1963), cert. den., 377 U. S. 924. That decision held that a school was "segregated" in the constitutional context if a student were excluded from it, or compelled to attend it, because of his race. It also ex-

[5] **United States v. Jefferson County Board of Education**, 372 F. 2d 836 (5 Cir., 1966), **on rehearing en banc** 380 F. 2d 385 (5 Cir., 1967), cert. den. 19 L. Ed. 2d 103, 104.

pressly held that whether a school was "segregated" was not to be determined, when measuring constitutional rights, by mathematical formulas applied to the racial composition of the school.

The continuing intent of Congress that no federal official should take any action requiring local school authorities to overcome racial imbalances was manifested in the 1966 amendments to the Elementary and Secondary Education Act of 1965 in which such officers were prohibited from requiring "the assignment or transportation of students or teachers in order to overcome racial imbalance." 80 Stat. 1212, 20 U. S. C. 242 (a).

The validity of H. E. W. guidelines, upon which the Fifth Circuit Court relied in **Jefferson County**, has not been assessed by any court based on a record made in the usual adversary process. A three judge district court before which that issue had been fully tried regarded the issue foreclosed to it by the **Jefferson County** decision. Counsel representing the Secretary of H. E. W. and the United States Commissioner of Education have successfully avoided a judicial appraisal of the guidelines in two other suits challenging their validity. However, they have been held to be illegal by a Hearing Examiner before whom the issue was developed during the course of H. E. W. administrative hearings. Moreover, the Appropriations Committee of the House has reported that the requirements of the guidelines go "beyond the law," and the Senate Appropriations Committee has reported "that the revised education guidelines contravene and violate the legislative intent of Congress in the enactment of the Civil Rights Act of 1964."[6]

The question of the validity of the guidelines is subject to sufficient doubt that this Court should not accept them

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[6] H. R. Rep. No. 271, 90th Cong., 1st Sess. 44 (1967). S. Rep. No. 1631, 89th Cong., 2d Sess. 71-73 (1966).

as establishing any sort of "minimum standards" for measuring the constitutionality of conduct as suggested by petitioners.

D. The freedom of choice method of school assignment affords the fullest possible exercise of a right that this Court has held to be secured by both the Fifth and Fourteenth Amendments—the right of a parent to direct the upbringing and education of his children. **Pierce v. Society of Sisters,** 268 U. S. 510; **Farrington v. Tokushige,** 273 U. S. 290. It does not impose a burden on the individuals affected as petitioners argue, but represents the *fullest possible departure from assignment of students on* a racial basis. As the brief of the United States as amicus curiae filed in 1952 in **Brown** said at page 23:

> "Segregation imposed by law is an interference with the right of an individual to exercise a voluntary choice as to those with whom he will associate. To remove such an interference is to enlarge individual freedom, not to limit it. 'Commingling' between white and colored persons can then result as the product of voluntary choice."

This Court's approval of the freedom of choice assignment procedure is strongly suggested in **Goss v. Board of Education,** 373 U. S. 683, and **Calhoun v. Latimer,** 377 U. S. 263, and the lower federal courts have been almost unanimous in holding it to be a constitutionally permissible method of school assignment and thus one that is within the discretion of the local school authorities to select.

The alternative method of assignment suggested by petitioners would deny to the parents of both Negro and white students a choice of the school their children will attend. They argue that the choice must be withheld because, when given a choice, most white children do not choose to attend a predominantly Negro school, and a sufficient number of Negro students choose to attend a

school with members of their own race that there continues to be predominantly Negro, or all-Negro, schools.

The pattern of voluntary racial association in this country is ample evidence that many, if not most, of its citizens of both races do not want the right to attend school with members of their own race sacrificed. Counsel for petitioners do not speak for all Negro citizens, and have no standing to "waive" their constitutional rights however persuaded they may be that the result would be beneficial.

This argument that Negro and white parents alike don't know what is best for their children when they choose to send them to schools with members of their own race, and that this Court must therefore adopt a rule of constitutional law that denies them the opportunity to make such a choice, demonstrates its own absurdity Individual constitutional liberties are not preserved by transferring decisions theretofore belonging to the individual to the school authorities, the courts, or any other governmental agency.

When left entirely to their own volition the American people tend to congregate in a multitude of groups, and prominent among them are racial groups. Throughout the nation the vast majority of both Negro and white students attend schools in which their own race predominates, and the proportion of students that have elected to do so in the Gould School District is not dissimilar to the proportion that has done so elsewhere in the country.

To the extent that there is a racial separation in this school district, it is purely voluntary. Voluntary racial separation offends no law or national policy. The Constitution does not prohibit the free choice of individuals and groups to select their associates; it secures their right to do so.

E. Experience, and official government surveys, prove that when the proportion of Negro students in a school

approaches 50% it tends to convert quickly to an all-Negro school. This is caused by the withdrawal of white students by parents who are unwilling to have their child in a school where the dominant culture is so different from their own. This phenomenon makes manipulation of school assignments in an effort to achieve a racial balance self-defeating. In Washington, D. C., Chicago, and virtually every other metropolitan area in the country with substantial Negro population, the white students have fled to the suburbs and private schools when confronted by assignment to a school where they would be in the minority.

This pattern has not yet developed in the southern and border states where there are hundreds of school districts with a majority or substantial minority of Negro students because the freedom of choice assignment procedure has only infrequently resulted in white students being confronted with mandatory assignment to a predominantly Negro school. However in those instances where this has occurred the result was the same as experienced in the northern cities.

Since there are about two Negro students for each white student in this school district, the procedure suggested by petitioners as a "feasible alternative" to freedom of choice would result in both schools being predominantly Negro if the white students continued to attend them. However, most if not all would be withdrawn. Although desegregation is an accomplished fact in this district, and every white child is attending a school where Negro students exceed 20% of the student body, the white parents in Gould would be no more willing than those in Chicago, Washington or New York to send their children to predominantly Negro schools.

Withdrawal of the white students from the public schools would produce in Gould—as it has elsewhere—im-

measurable harm to all concerned. The Constitution does not mandate this result.

Respondents accept without reservation their obligation to comply with the Constitution as construed in **Brown**. However, that decision does not require that they abandon an assignment procedure that assures every child admission to the school of his choice in favor of one that would greatly damage, if not destroy, the public schools of this community.

ARGUMENT.

I.

The District Court Correctly Dismissed the Complaint When the Proof at Trial Established That Respondents Had Voluntarily Undertaken a Program of Desegregation and Were Proceeding to Administer It in Good Faith.

Petitioners' Question No. 1 presents the issue of whether plaintiffs in cases relating to school desegregation are entitled to keep every such case on the district court docket in perpetuity notwithstanding the judicial determination that the defendants are discharging their constitutional obligations in good faith. It is asserted that although both lower courts so found in this case, the suit should have been retained on the district court docket so that it could "supervise the desegregation process" (Petitioners' brief, p. 12). Implicit in the petitioners' argument is the assumption that continuing judicial supervision is necessary in every case purporting to have any connection with school desegregation in order to insure that constitutional rights are protected, without regard to whether there is any merit to the allegations of constitutional misconduct of the defendants. Such a proposition has no rational support and, if adopted, would soon result in the district courts supervising the operation of every school district in the nation where any patron conceives some act of the local school authorities to violate his constitutional rights. As the court of appeals said in the case at bar (A. 151):

> "Courts are not equipped to solve the everyday problems of school operation. The court's interference with the Board's operation of its school is justified only upon a showing that the Board in its operation

of its school is depriving pupils of rights guaranteed by the federal constitution."

Petitioners' position in this matter is grounded upon the assertion that the court of appeals misconceived the obligation of the lower federal courts created by the **Brown** decisions to retain school desegregation cases on their dockets. Indeed this Court did say in **Brown v. Board of Education,** 349 U. S. 294, 301:

"During this period of transition, the courts will retain jurisdiction of these cases."

The Court obviously had reference to the five consolidated cases then before it, but the lower federal courts have taken this language to require that other school desegregation cases be retained on the district court docket where injunctive relief has been granted to insure that the terms of the injunction are carried out. As a result there are several hundred such cases now pending in the district courts, and many have been on those dockets for several years.

On the other hand, the **Brown** decisions cannot fairly be read to support the assertion that in any case having any relationship to school desegregation, however remote, the district court is obligated to retain the suit on its docket *ad infinitum*. If this substantial class of cases were exempt from dismissal, when dismissal is the adjudication dictated by traditional legal and equitable rules, the obvious result would be an intolerable financial burden on the litigants of being in court forever and a significant reduction in the authority of the district courts to effectuate an orderly management of their dockets.

Of course, the quoted language in **Brown** was not intended to produce such absurd results. It implied no more than that these cases would be retained on the district court dockets for so long as the circumstances in each case

indicated a need for judicial supervision of the desegregation process. In cases such as the one at bar where the circumstances make appropriate a final judgment then the **Brown** language does not inhibit such disposition. It must be remembered that in this case the lower courts expressly found that respondents were proceeding in good faith to administer a desegregation plan that met constitutional standards and which was voluntarily adopted before the filing of the suit. The proof showed that they were already voluntarily discharging their constitutional obligations and manifesting the intention to continue to do so. In view of this the district court concluded: "It is obviously not the purpose of an injunction to order someone to do something he is already doing * * *" (A. 25). This is so well supported by both logic and precedent that it is not fairly debatable.

It is a basic principle in our jurisprudence that "Public policy dictates that there be an end of litigation;" **Baldwin v. Iowa State Traveling Men's Asso.**, 283 U. S. 522, 525. This principle is certainly applicable to cases related to school desegregation, involving as they do the diversion of funds and energies intended for the education of our children and the perpetuation of community discord that necessarily flows from the long-continued pendency of these suits.

The court of appeals that heard this case suffers from no misconception about the obligation of the district courts to retain jurisdiction in these cases when such a course would serve the interests of justice under the circumstances. It has frequently reversed district court decisions dismissing these cases and directed that the cases be restored to the district court dockets, the most recent such decision being **Yarbrough v. Hulbert-West Memphis School District**, 380 F. 2d 962 (8 Cir., 1967).

However, where the parties have joined issue by their pleadings and their proof, and where after a full trial

the district court has decided that the evidence does not entitle plaintiffs to any judicial relief on those issues, it would be absurd to require that the case be retained on the docket simply because it had something to do with school desegregation and there was the speculative possibility that some different issue might arise between the parties in the future. The doors of the district courts remain open to adjudicate such future controversies, if and when they arise, in fresh litigation.

II.

Respondents' Freedom of Choice Plan for School Assignment Satisfies Constitutional Standards.

By their Question No. 2 petitioners seek to test the constitutional sufficiency of respondents' freedom of choice assignment method to satisfy the mandate of **Brown**. We have already pointed out in the Statement herein that this Court is being asked to review an issue that was not tried in the district court, and which the court of appeals declined to review because it was raised for the first time on appeal.

The record contains no facts pertaining to the operation of respondents' desegregation plan subsequent to the trial in November, 1965, and therefore provides no basis to test the adequacy of the plan in practical operation. The only question that could be decided on the record is whether the plan was sufficient in 1965 in its initial application.

Petitioners assert in their Question No. 2 that there "is a feasible alternative assignment method"; but the record is barren of any proof that the scheme for reorganization of the school district and redistribution of the students that they propose in this Court is educationally or physically feasible or even possible. In short,

this Court is being asked to hear this case de novo, to decide issues not presented to the courts below and which involve facts which are not in the record.

However, from sources outside of the record, petitioners have placed before the Court certain data pertaining to this school district for the 1966-67 and 1967-68 school years. Because of the possibility that the Court may view this evidence to be properly before it we do not confine our discussion to the question of whether the plan was a permissible assignment procedure in 1965. We will discuss, as do petitioners, the question of whether a freedom of choice method of student assignment is constitutionally permissible if the choices made pursuant to it do not result in some sort of balance in the racial composition in each school.

A. This Court Has Not Construed the Constitution to Impose the Duty on School Officials to Affirmatively Mix the Races in the Public Schools.

In **Brown v. Board of Education,** 349 U. S. 294, 298, this Court characterized its holding in the decisions rendered a year earlier (347 U. S. 483) in this language:

> "The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference."

Thus it is discriminatory classification by a state agency based on race that is condemned. There is no suggestion of a duty to affirmatively mix the races. This is confirmed by the direction given to the lower courts in remanding the cases. The Court directed at 349 U. S. 294, 301 that decrees be entered requiring the school authorities

> "* * * to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."

It was not directed that they be admitted to schools which, by design or manipulation of assignments, contained students of another race.

The Court had before it in **Brown** the express question of whether its constitutional holding required a decree fixing geographic zoning as the sole lawful method of affording Negro students the rights it had concluded they possessed. In **Brown I** the Court expressly called for further argument and briefing on the question, in light of its decision therein announced:

> "(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, * * *."

Of course, in **Brown II** it did not adopt the view that vindication of constitutional rights required that school assignments be made solely on a geographic basis. It left to local school authorities the flexibility of fashioning the methods by which the transition would be made from imposed segregation to "a system of determining admission to the public schools on a nonracial basis . . ." 349 U. S. 294, 300. The negative terms selected by the Court, "racially nondiscriminatory" and "nonracial", imply no affirmative duty to devise a system to produce maximum racial mixing or balance in the schools. Race was simply forbidden as a criterion in making school assignments.

A review of the arguments and briefs, as well as the Court's opinions, in **Brown**, reveals that no one connected with those cases was advocating the position that the Constitution required mixing of the races in the public schools. To the contrary, the claim was that the Fourteenth Amendment prohibited state-imposed racial classification for school assignment, but did not otherwise restrict the discretion of the local authorities respecting the assignment procedures they adopted. Mr. Justice Mar-

shall, arguing at the bar of this Court in 1952 on behalf of the appellants in the case from South Carolina, made this perfectly clear.[7]

The precision of the Court's language, viewed in light of the acknowledged necessity that the decision be framed in terms of "fastidious accuracy"[8] simply leaves no room for argument that the Court intended something different from what it said, i. e., that race was not a constitutionally permissible basis for classification in the public schools. There is no ambiguity in the **Brown** decisions to justify the conclusions of those writers, speculating about what the Court "really intended", that the decisions meant that the Constitution required integration of the races in the public schools by whatever means and methods that may be necessary to accomplish it.

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[7] Argument on December 9, 1952 in No. 101, October Term, 1952:

> Mr. Marshall: "But if this Court would reverse and the case would be sent back, we are not asking for affirmative relief. That will not put anybody in any school. The only thing that we ask for is that the state-imposed racial segregation be taken off, and to leave the county school board, the county people, the district people, to work out their own solution of the problem to assign children on any reasonable basis they want to assign them on." pp. 23-4.
>
> Mr. Marshall: "But my emphasis is that all we are asking for is to take off this state-imposed segregation. It is the state-imposed part of it that affects the individual children." p. 28.

All references herein to the arguments in the **Brown** cases are to the Transcripts of Ward & Paul contained in the Library of this Court.

[8] Argument on April 12, 1955 in Nos. 2 and 3, October Term, 1954.

During the course of arguments expressly dealing with the terms of the remedy to be contained in the Court's mandate, Mr. Justice Frankfurter observed:

> Justice Frankfurter: "I am sure you will agree in this kind of litigation, it is of the utmost importance to use language of fastidious accuracy?"
>
> Mr. Marshall: "Absolutely, we agree with you fully."

Three years after **Brown II** the Court again chose precise language to characterize its earlier decision. In **Cooper v. Aaron**, 358 U. S. 1, 5, it said:

> "On May 17, 1954, this Court decided that **enforced** racial segregation in the public schools of a state is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment" (emphasis supplied).

With the holding of **Brown** so stated the Court expressly reaffirmed its unanimous adherence to that decision, the occasion to do so being the addition of three Justices to the Court since it was decided.

No subsequent decision of this Court indicates that **Brown** intended to condemn anything except state enforced racial segregation in the schools. See **Goss v. Board of Education**, 373 U. S. 683; **Griffin v. School Bd. of Prince Edward County**, 377 U. S. 218; and **Calhoun v. Latimer**, 377 U. S. 263. Indeed, **Goss** strongly suggests recognition of the validity of an unrestricted freedom of choice assignment method, without reference to the resulting racial composition in the various schools, and **Calhoun** was remanded for proceedings to determine whether a free transfer plan adopted subsequent to trial would constitutionally validate Atlanta's desegregation procedure, again without reference to the racial distribution of students that it produced.

B. **The Better Reasoned Decisions of Other Courts Reject the Proposition That the Constitution Requires Affirmative Action by School Authorities to Mix or Balance the Races in the Public Schools.**

Petitioners repeatedly assert that the constitutional duty of local school authorities is to "disestablish the dual school system." The test they urge to measure whether a school system is being operated on a constitutionally permissible basis is whether schools are "identifi-

able as being for Negroes or for whites." Petitioners' brief, p. 13. This is the common theme advanced by petitioners in this case and the other two cases with which it has been set for argument.[9]

It is not enough, they insist, that every student in these school districts has been assigned to school by a procedure in which the school authorities have given no weight or effect to his race. Race, as a criterion for school assignment, has been abandoned by each of these three school districts in obedience to **Brown** and the Civil Rights Act of 1964. In none of these three cases is there any serious claim that the school assignment plan was not fairly administered or that there is any coercion or intimidation of Negroes in the exercise of their rights under the assignment plans. The feature common to the three cases that petitioners claim to be constitutionally objectionable is the existence of one or more all-Negro schools in each of these districts.[10]

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[9] **Green v. County School Board**, No. 695 and **Monroe v. Board of Commissioners**, No. 740.

[10] The Solicitor General, in his brief amicus curiae, also would measure the constitutionality of a student assignment procedure by whether or not it produced commingling of the races at each school. At page 10 it is stressed that the existence of the all-Negro schools in these districts is "the situation that most concerns us". There apparently has been a fundamental change in the views of the Department of Justice on the question of whether there must be commingling of the races to satisfy the Constitution since the Attorney General, in his brief for the United States as amicus curiae filed December 3, 1952 in **Brown**, advised this Court at page 23:

> "In the **Plessy** case the view was expressed (p. 551) that the alternative to racial segregation compelled by law is 'an enforced commingling' of white and colored persons. This observation, apart from its irrelevance to the constitutional issue, is a plain *non sequitur*. Segregation imposed by law is an interference with the right of an individual to exercise a voluntary choice as to those with whom he will associate. To remove such an interference is to enlarge individual freedom, not to limit it. 'Commingling' between white and colored persons can then re-

Stripped of the semantic gloss produced by such terms as "racial balance", "disestablishment of segregation", "de facto and de jure", and "racial identifiability of schools", the attack here is directed against the authority of any public school system to permit a school attended solely by Negroes to exist.

We must, therefore, examine the question of whether the Fourteenth Amendment prohibits the existence of an all-Negro school. The Amendment by its terms does not purport to deal with the subject, and this Court has never held that the Constitution proscribes the maintenance of an all-Negro school. However, the assertion that the all-Negro school is unconstitutional and that the only remedy is to require affirmative racial mixing in **every** school has received much attention from the lower federal courts since **Brown.**

The three-judge district courts to which two of the cases before this Court in **Brown** were remanded had occasion to deal with this argument shortly after **Brown II.** In **Brown v. Board of Education,** 139 F. Supp. 468 (D. C. Kan. 1955), the objection was raised that all-Negro schools continued to exist. The court said:

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sult as the product of voluntary choice, not of legal coercion. Cf. **McLaurin v. Oklahoma State Regents,** 339 U. S. 637, 641-42.

The citation to **McLaurin** is an appropriate one for there the Court said at pages 641-2:

> "There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. Shelley v. Kraemer, 334 U. S. 1, 13, 14, 92 L. ed. 1161, 1181, 68 S. Ct. 836, 3 ALR 2d 441 (1948). The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits."

> "It was stressed at the hearing that such schools as Buchanan are all-colored schools and that in them is no intermingling of colored and white children. Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color." 132 F. Supp. at 470.

The three-judge court in **Briggs v. Elliott,** 132 F. Supp. 776 (E. D. S. C. 1955), made the same analysis. Speaking for the court Judge Parker referred to this Court's decision in **Brown** and said:

> "It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. * * * If the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation." 132 F. Supp. 776, 777.

This view has been approved and adopted by the court of appeals of every circuit where there has been significant litigation pertaining to school desegregation. In **Springfield School Committee v. Barksdale,** 348 F. 2d 261 (1 Cir., 1965), the court said, referring to the opinion of the district judge it was reversing:

"Certain statements in the opinion, notably that 'there must be no segregated schools,' suggest an absolute right in the plaintiffs to have what the court found to be 'tantamount to segregation' removed at all costs. We can accept no such constitutional right." 348 F. 2d at 264.

The Fourth Circuit has repeatedly embraced the **Briggs** principle. See **Jeffers v. Whitley**, 309 F. 2d 621, 627 (4 Cir., 1962); **Bradley v. School Board of City of Richmond**, 317 F. 2d 429, 438 (4 Cir., 1963), **rev'd on other grounds** 382 U. S. 103; **Swann v. Charlotte-Mecklenburg Board of Education**, 369 F. 2d 29 (4 Cir. 1966);[11] and **Bowman v. County School Board**, 382 F. 2d 326 (4 Cir., 1967).

The Fifth Circuit Court said in **Avery v. Wichita Independent School District**, 241 F. 2d 230, 233 (5 Cir., 1957):

"The Constitution as construed in the School Segregation Cases, Brown v. Board of Education (citation), and Bolling v. Sharpe (citation), forbids any state action requiring segregation of children in public schools solely on account of race; it does not, however, require actual integration of the races. As was well said in Briggs v. Elliott, * * *."

The court then proceeds to quote Judge Parker's language from that decision. Again in **Borders v. Rippy**, 247 F. 2d 268, 271 (5 Cir., 1957), that court said:

"The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools."

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[11] In **Swann** the court said: "Whatever the Board may do in response to its own initiative or that of the community, we have held that there is no constitutional requirement that it act with the conscious purpose of achieving the maximum mixture of races in the school population." 369 F. 2d at 32.

The Courts of Appeals for the Sixth, Seventh, Eighth and Tenth Circuits expressed the same views. **Deal v. Cincinnati Board of Education**, 369 F. 2d 55 (6 Cir., 1966), **cert. denied**, 389 U. S. 846;[12] **Bell v. School City of Gary**, 324 F. 2d 209 (7 Cir., 1963),[13] **cert. denied**, 377 U. S. 924; **Clark v. Board of Education**, 369 F. 2d 661 (8 Cir., 1966), **on rehearing** 374 F. 2d 569 (8 Cir., 1967);[14] and

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[12] The court rejected the argument that school authorities had an affirmative duty to overcome racial imbalance in this language:

> "We hold that there is no constitutional duty on the part of the Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause, nor is there a like duty to select new school sites solely in furtherance of such purpose." 369 F. 2d at 61.

[13] "Plaintiffs are unable to point to any court decision which has laid down the principle which justifies their claim that there is an affirmative duty on the Gary School System to recast or realign school districts or areas for the purpose of mixing or blending Negroes and whites in a particular school." 324 F. 2d at 212.

[14] "Though the Board has a positive duty to initiate a plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. The Constitution prohibits segregation of the races, the operation of a school system with dual attendance zones based upon race, and assignment of students on the basis of race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to their classrooms. We find no unlawful discrimination in the giving of students a free choice of schools. The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. It is true that statistics on actual integration may tend to prove that an otherwise constitutional system is not being constitutionally operated. However, these statistics certainly do not conclusively prove the unconstitutionality of the system itself." 369 F. 2d at 666.

Downs v. Board of Education of Kansas City, 336 F. 2d 988 (10 Cir., 1964),[15] **cert. denied**, 380 U. S. 914.

Agreement that the Fourteenth Amendment did not command purposeful mixing of the races in the public schools continued to be virtually universal until **United States v. Jefferson County Board of Education**, 372 F. 2d 836 (5 Cir., 1966), **on rehearing en banc** 380 F. 2d 385 (5 Cir., 1967), **cert. denied** 389 U. S. 840. A divided panel of that court observed:

> "As we see it, the law imposes an absolute duty to desegregate, that is, disestablish segregation. And an absolute duty to integrate, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored; racial mixing of students is a high priority educational goal." 372 F. 2d at 846-847 n. 5.

The two judge majority then concluded that the freedom of choice method was not a constitutionally permissible school assignment procedure because it did not insure substantial mixture of the races in each school.[16] The protest that the means it mandated to achieve what it considered to be an educationally desirable goal consist-

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[15] "Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them." 336 F. 2d at 998.

[16] "If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, * * * Freedom of choice is not a key that opens all doors to equal educational opportunities." 372 F. 2d at 895-6.

ently had been held to violate the Constitution gave the court little difficulty. It noted that this was 1966 and a remedy to comply with **Brown** now, molded to fit contemporary educational, social and political circumstances, must be substituted for the remedy (measured by the requirements of the Constitution) so carefully framed by this Court in 1955.[17]

This decision was confirmed on rehearing **en banc** by a court divided eight to four. 380 F. 2d 385 (5 Cir., 1967). Thus for the first time a federal appellate court construes the negative prohibitions of the Fourteenth Amendment against discriminatory racial classifications to constitute affirmative commands to mix the races.[18]

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[17] "If this process be 'integration' according to the 1955 **Briggs** court, so be it. In 1966 this remedy is the relief commanded by **Brown**, the Constitution, the Past, the Present, and the wavy fore-image of the Future." 372 F. 2d at 878. The policy of neutrality that the State is required to maintain in matters concerning race is obviously violated by the affirmative action to achieve racial mixtures of school students required by this decision. See **Evans v. Newton**, 382 U. S. 296, 299, where the Court said:

> "But a municipal golf course that serves only one race is state activity indicating a preference on a matter as to which the State must be neutral."

[18] Neither **Taylor v. Board of Education of New Rochelle**, 294 F. 2d 36 (2 Cir., 1961), nor **Board of Education of Oklahoma City v. Dowell**, 375 F. 2d 158 (10 Cir., 1967), lend any support to the **Jefferson County** decision. **Taylor** involved devising an equitable remedy to circumvent school zone boundaries that were proven to have been deliberately gerrymandered by the school authorities, and the remedy fashioned was freedom of choice imposed on the geographic zones. In the Oklahoma City case the court distinguished **Downs v. Board of Education**, 336 F. 2d 988 (10 Cir., 1964), on the ground that the Oklahoma City school authorities were found to be in bad faith in carrying out the district court's orders. The court was careful to say:

> "It is still the rule in this Circuit and elsewhere that neighborhood school attendance policies, when impartially maintained and administered, do not violate any fundamental Constitutional principle or deprive certain classes of individuals of their Constitutional rights." 375 F. 2d at 166.

Other courts have shown little inclination to endorse the rationale of **Jefferson County**. The two concurring judges accepted it in **Bowman v. County School Board,** 382 F. 2d 326 (4 Cir., 1967), but the balance of the court sitting *en banc* rejected it. Panels of the Eighth Circuit Court seem to have accepted at least some of its underlying philosophy. **Kelley v. Altheimer,** 378 F. 2d 483 (8 Cir., 1967); and **Kemp v. Beasley,** ... F. 2d ... (8 Cir., 1968). However, other panels of that court have expressly rejected the decision (**Clark v. Board of Education,** 374 F. 2d 569, 571 (8 Cir., 1967)), or have done so by implication (**Yarbrough v. Hulbert-West Memphis School District,** 380 F. 2d 962 (8 Cir., 1967)). The Sixth Circuit Court has carefully pointed out the basic error of **Jefferson County** and has expressly declined to follow it. **Monroe v. Board of Commissioners,** 380 F. 2d 955, 958 (6 Cir., 1967).

A district court in the Fifth Circuit, and as such responsible to the court that decided **Jefferson County,** has made a perceptive analysis of the forces that result in judicial decisions purportedly grounded on the Constitution but in fact resting on social and political philosophy. Referring to **Jefferson County** and **Hobson v. Hansen,** 269 F. Supp. 401 (D. C. D. C. 1967), Judge Frederick Heebe describes one of the features that characterizes such decisions as:

> "* * * an attempt by civic and social-minded judges to add legal precepts to the force of moral, social and political principles in the effort of the responsible sectors of our society to eradicate the divisive and ruinous prejudices between the citizens of this nation. Both tendencies are laudable. But the end does not necessarily justify the means. *De jure* segregation can be eradicated without ordering a wholesale mixing of the races and making that order a principle of constitutional law. And prejudices can be eroded and this nation united without dispensing

with the legal and constitutional philosophy which is our unique and precious inheritance."

Moses v. Washington Parish School Board, 276 F. Supp. 834, 846-847 (D. C. La., 1967).

While the courts, and ultimately this Court, are the final arbiters of what the Constitution requires, there are persons whose positions and experience in non-judicial capacities entitles their judgments in this matter to at least some weight. No lesser champion of the rights of minority groups than the Vice-President of the United States has written:

> "To use fixed racial quotas in the assignment of students, as is now being tried in some metropolitan centers, does not appear a sound and workable solution. In assigning students on the basis of such quotas, the constitutional principle that race is not a legitimate factor for determining school assignment is actually being violated. The Constitution is color-blind; it should no more be violated to attempt integration than to preserve segregation."[19]

Dr. James Bryant Conant, whose earlier work, **The American High School Today**, is cited by petitioners as "the most important study of secondary education that has been made in this country" (Petitioner's brief, p. 26) has made the same analysis of the Constitution and of **Brown**, and urges that from an educational point of view more progress can be made by improving the all-Negro school than by manipulation to place Negroes in predominantly white schools.[20]

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[19] Hubert H. Humphrey, **Integration vs. Segregation**, Thomas Y. Crowell Company, New York (1964), p. 3.

[20] James Bryant Conant, **Slums and Suburbs**, McGraw-Hill Book Co., New York (1961), pp. 38-41:

> "In concluding this chapter, I should like to turn to a thorny subject of great concern to those interested in im-

With commendable candor the principal counsel for petitioners in each of these three cases has agreed that the Constitution does not condemn the all-Negro school:

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proving Negro education. This is the question of whether or not de facto segregation, as some like to call it, is detrimental to the education of the Negro. Closely related is a second question; namely, should the school authorities endeavor to move Negro children into purely white schools in order to have as many mixed schools as possible? The issue is a very real one, and in a sense it is primarily political. At this point I must make reference to the Supreme Court decisions of 1954 and 1955 because of a tendency to regard them not only as the law of the land but as a sacred text on education. Clearly even a unanimous opinion of the Supreme Court fails to determine educational policy except within the framework set by the issues before the Court—in this case, the 'segregation of children in public schools solely on the basis of race.' It is necessary to point out this obvious fact, for I have heard the statement made that because the Supreme Court expressed the opinion that 'Separate educational facilities are inherently unequal,' all completely Negro schools are morally wrong and that there is essentially no difference between de jure segregation still found in almost all Southern communities (1961) and what some call de facto segregation in portions of the large Northern cities. The point is important and deserves discussion.

"If one turns to the Supreme Court decision in the case of Brown et al. v. Board of Education of Topeka (347 U. S. 483 (1954)), one finds the sentence I have just quoted about separate educational facilities. Taken out of context, the conclusion might be drawn that the justices declared separate educational facilities for whatever reason provided are morally wrong and if supported by tax funds are illegal. Yet on reading carefully the whole opinion, I think the key sentence is the question defined by the Court: 'Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.' I have emphasized the word 'solely', as I presume to think it is the essential word. The justices appear to have expressed no view as to whether the pupils in a completely Negro school are deprived of equal educational opportunity if they are not assigned solely because of their race.

* * * * * * * *

"In some cities, political leaders have attempted to put pressure on the school authorities to have Negro children

"Moreover, the jury discrimination precedents may be recalled: Bias may be presumed from a consistently segregated result; a token number of Negroes may be legally equivalent to none. If, however, in education there were complete freedom of choice, or geographical zoning, or any other nonracial standard, and all Negroes still ended up in certain schools, there would seem to be no constitutional objection."

Jack Greenberg, **Race Relations and American Law**, Columbia University Press, New York (1959), pp. 239-40.

C. The Civil Rights Act of 1964 Adopts as National Policy Prohibition of the Use of Race as a Criterion for School Assignment, and This Prohibition Includes the Use of Racial Classifications for the Purpose of Eliminating Racial Imbalances.

Congress spelled out the national policy pertaining to racial considerations in public school assignment in unambiguous terms in the Civil Rights Act of 1964. In the subchapter dealing with public education it provided:

"'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." 78 Stat. 246, 42 U. S. C., § 2000-c(b) (1964).

The language could not be more clear. The public policy of the nation is that students must be assigned to the

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attend essentially white schools. In my judgment the cities in which the authorities have yielded to this pressure are on the wrong track. Those which have not done so, like Chicago, are more likely to make progress in improving Negro education. It is my belief that satisfactory education can be provided in an all-Negro school through the expenditure of more money for needed staff and facilities."

public schools on non-racial criteria, but school authorities are not to be required to manipulate assignments to achieve racial balances.

Title IV of the Act confers authority on the Attorney General to initiate civil suits to "further the orderly achievement of desegregation in public education", subject to this provision:

> "* * * provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." 78 Stat. 248, 42 U. S. C., 2000c-6 (1964).

The legislative history establishes beyond doubt that it was the intention of Congress to adopt, and thus confirm as the national policy, Judge Beamer's interpretation of the Constitution in **Bell v. School City of Gary, Ind.**, 213 F. Supp. 819 (N. D. Ind.), **aff'd.** 324 F. 2d 209 (7 Cir., 1963), **cert. denied**, 377 U. S. 924. Senator Humphrey, manager of the Bill in the Senate, made this statement during the debate:

> "Judge Beamer's opinion in the Gary case is significant in this connection. In discussing this case, as we did many times, it was decided to write the thrust of the court's opinion into the proposed substitute." 110 Cong. Rec. 12715.

The "thrust" of the Gary decision was accurately described by Senator Humphrey to be:

> "I should like to make one further reference to the Gary case. This case makes it quite clear that while the Constitution prohibits segregation, it does not re-

quire integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race. The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems." 110 Cong. Rec. 12717.

It is interesting to note that the plaintiffs in the Gary case urged that whether a school was "segregated" within the context of the **Brown** decisions should be determined by applying a mathematical formula to the racial composition of the school. One witness they presented was a sociology professor, and he testified that by applying his formula to the Gary schools he concluded that any school with less than 36%, or with more than 72%, Negro students was segregated. Judge Beamer observed that the professor's definition of a segregated school "may be a good sociological definition," but that it was not a good legal one. The court then supplied this definition of a segregated school in the constitutional context:

> "* * * a school which a given student would be otherwise eligible to attend, except for his race or color, or, a school which a student is compelled to attend because of his race or color." 213 F. Supp. 819, 829.

This is the definition of a segregated school that Congress adopted in 1964. There is no such school in any of the school districts now before the Court.

During the debate in the Senate concern was expressed that the provision prohibiting federal officials and courts from issuing any order seeking to achieve racial balance in the schools was in Title IV of the Bill and not in Title VI dealing with public education. Senator Byrd inquired:

Mr. Byrd of West Virginia: Can the Senator from Minnesota assure the Senator from West Virginia that under title VI, school children may not be bused from one end of the community to another end of the community at the taxpayers' expense to relieve so-called racial imbalance in the schools?

Mr. Humphrey: I do.

* * * * * * *

Mr. Byrd of West Virginia: But would the Senator from Minnesota also indicate whether the words "provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance" would preclude the Office of Education, under section 602 or title VI, from establishing a requirement that school boards and school districts shall take action to relieve racial imbalance wherever it may be deemed to exist?

Mr. Humphrey: Yes. I do not believe in duplicity. I believe that if we include the language in title IV, it must apply throughout the act. 110 Cong. Rec. 12715.

Respecting his capacity to speak authoritatively on the intent of the proposed legislation, Senator Humphrey said:

Mr. Humphrey: But I am manager of the bill, and, as a part of the legislative history, that would have some importance. It would not be important because those words came from Senator Humphrey, but it would be important because the Senator from Minnesota is manager of the bill.

The continuing congressional intent that racial imbalance in the public schools was not a matter of federal concern,

and was not to be the criterion by which federal officials measured compliance by school districts with statutory and constitutional standards, is reflected in the 1966 amendments to the Elementary and Secondary Education Act of 1965 when the emphasized language was added:

> "In the administration of this chapter, no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the personnel, curriculum, or program of instruction of any school or school system of any local or State educational agency, **or require the assignment or transportation of students or teachers in order to overcome racial imbalance.**" 80 Stat. 1212, 20 U. S. C. 242 (a) (1965-66 Supp.).

The language and intent of the Civil Rights Act of 1964 demonstrate the basic flaw in the court's reasoning in **Jefferson County.** In the second sentence of that opinion the court lays the foundation upon which it builds its conclusion that an unbroken line of its own decisions must be overruled. At 372 F. 2d 836, 845 Judge Wisdom says:

> "The distinctive feature of these cases, consolidated on appeal, is that they also require us to reexamine school desegregation standards in the light of the Civil Rights Act of 1964 and the Guidelines of the United States Office of Education, Department of Health, Education, and Welfare (HEW)."

Then, although the congressional intent to adopt Judge Beamer's interpretation of the Constitution in the Gary case was clearly manifested, the court erroneously concluded that the Act and the Constitution commanded elimination of racial imbalances. Neither is that court's de facto—de jure rationale supported by the Act. Gary had practiced enforced segregation of the races in its schools until 1949, but this prior unconstitutional conduct

was not held to require a punitive injunction to redistribute the students in order to obtain a racial balance. **Bell v. School City of Gary, Ind.**, *supra*.

The court's reliance on the H. E. W. Guidelines in **Jefferson County** to measure constitutionality of conduct, and petitioners' assertion that they should be accepted by the courts as "minimum standards for court-ordered desegregation plans", makes it necessary to put those regulations in an accurate perspective. The first H. E. W. Guidelines were published in April, 1965, and had a vast and immediate impact on the operations of the public schools in seventeen Southern and border states.[21] Thereafter suits were brought in several district courts to test their validity. It was charged that the Guidelines were invalid on the grounds, *inter alia*, that they were being enforced without the prior approval of the President as required by § 602 of the Civil Rights Act of 1964, and that they were designed to, and in application did, achieve objectives they were in violation of the Act. The major charge in each of these suits was that the Guidelines as drawn and applied were being used as an instrument to require local school authorities to eliminate racial imbalance as a prerequisite to continued eligibility for federal financial assistance.

Notwithstanding the public importance of the issues, the incredible fact is that no court has yet made a final independent assessment of the validity of the Guidelines based on a record made in the usual adversary process.

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[21] Congress subsequently responded to this discriminatory application of federal standards between regions of the nation by providing in the Elementary and Secondary Education Amendments of 1967, with respect to HEW and the United States Office of Education, that:

> "All such rules, regulations, guidelines, interpretations, or orders shall be uniformly applied and enforced throughout the fifty States." 81 Stat. 783.

In **Jefferson County** the question of the validity of the Guidelines had not been before any of the district courts and the court of appeals' evaluation of them was on a record barren of any proof respecting their purpose or their application.[22] Judge Godbold said in his dissent:

> "These Guidelines were not involved in any manner in the cases when litigated in the district courts, and the parties had no opportunity to raise by normal judicial procedures and methods questions of their constitutionality and their consistency with the 1964 Act, to draw the issues and develop evidence thereon." 380 F. 2d 425.

He then observes that it is "especially unfortunate" that the court discussed the constitutionality and validity of the Guidelines since there was pending before a three-judge court in Alabama a case in which these questions had been fully tried, briefed and argued. The "mischief of failure to exercise requisite judicial restraint" (380 F. 2d 426), is demonstrated by the subsequent opinion of the three-judge district court which considered these issues foreclosed to it. **Alabama NAACP State Conference of Branches v. Wallace**, 269 F. Supp. 346 (D. C. M. D. Ala., 1967). Respecting the validity of the Guidelines that court said it was its "clear duty to follow the decision" of its court of appeals, and even if it were not so bound the decision of that court *en banc* "is entitled to such great deference and respect that we would be unwilling to depart from it." 269 F. Supp. 350. It fairly may be inferred from the tone of the district court opinion that

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[22] Judge Bell observed in his dissent: "The court errs in prematurely holding that the guidelines issued by HEW are constitutional and within the scope of the Civil Rights Act of 1964. No guidelines whatever were considered by the district courts. 380 F. 2d at 417.

Judge Coleman states: "Since the HEW guidelines were not the subject of a hearing in the Courts below I do not discuss them here. In my view, they are not now before this Court." 380 F. 2d at 419.

had it been free to make an independent evaluation of the validity of the Guidelines on the record before it the result would have been different.

Other appellate courts have withheld passing on the validity of the Guidelines when that was not an issue that had been developed in the record before the district court. In **Kelley v. Altheimer**, 378 F. 2d 483, 499, 500 (8 Cir., 1967), the court said:

> "To the extent that this opinion may constitute approval of said guidelines, it is not intended to deny a day in court to any person in asserting any individual rights or to the Board of Education in contesting any section of the H. E. W. Guidelines."

Although recognizing that the Guidelines were of questionable validity, the district courts have likewise refrained from passing on their legality when that was not an issue joined by the parties in their pleadings and proof. Thus in **Kelley v. Altheimer**, No. PB 66 C-10 (D. C. E. D., Ark.), Judge Henley makes this observation in his opinion filed June 3, 1966:

> "It seems obvious to the Court that the Commissioner is carrying out a broad program of social welfare in the field of education, involving the granting or withholding of federal funds, and that the ultimate goal which he is seeking to achieve may well go beyond what the Constitution requires.
>
> "* * * the Commissioner is clearly going further than the Constitution requires since a reading of the new guidelines discloses that the aim of the Office of Education is to fully integrate public school student bodies and faculties and to eliminate dual school facilities."

If the Guidelines do go further than the Constitution requires with respect to the duties they impose on school

authorities, then they obviously go further than authorized by the Civil Rights Act of 1964.[23] In adopting the Act Congress' manifest intent was to require nothing more or less than obedience to the Constitution.

In addition to the Alabama case, the Guidelines were squarely challenged in two other district courts. In **Lee County School District v. Gardner,** 263 F. Supp. 26 (D. C. S. C., 1967), the court overruled defendants' motion to dismiss grounded on the doctrines of exhaustion of administrative remedies and of sovereign immunity, but withheld decision on the merits until the administrative proceedings under H. E. W. regulations had been completed. No subsequent decision in the case is reported.

In **Dermott Special School District v. Gardner,** ... F. Supp. ... (D. C. E. D., Ark., 1968) the court also overruled the motion to dismiss on the sovereign immunity and exhaustion of administrative remedies grounds. In this case, after a hearing on plaintiff's motion for partial summary judgment declaring the Guidelines invalid and enjoining their enforcement, defendants unilaterally dismissed the administrative proceedings and restored the school district's eligibility for federal financial assistance. Defendants then asserted as an additional ground for dismissal that the case had become moot. The court held that the case was not moot, but declined to decide it on the merits saying:

> "A final disposition of this issue (validity of the Guidelines) at this time would require consideration of some constitutional questions of considerable magnitude. The courts appear to be reluctant to pass on such constitutional issues unless such decisions are

[23] Even petitioners recognize that the duty they argue is imposed on all school authorities which they characterize to be "to disestablish the dual system" involves enforcement of "requirements more stringent than those imposed by the Fourteenth Amendment." Petitioners' brief, p. 21, fn. 10.

> indispensable to a proper disposition of the case. Since defendants have abandoned the challenged course of conduct, i. e., withholding of the funds, the Court feels warranted in deferring judgment on this issue unless or until withholding of such funds be renewed." ... F. Supp. ....

The court did make one finding that sheds some light on the administrative hurdles that school districts have encountered, and which have effectively restrained recourse to the courts to test the Guidelines' validity.

> "In the instant case the administrative proceedings drug on for over a year notwithstanding Plaintiff's repeated efforts to expedite them. Without reciting in detail the unilateral delays in administrative proceedings that resulted from Defendants' actions, as sustained by the evidence and the record, the Court is of the opinion that the administrative remedies made available to the Plaintiff School District were sufficiently inadequate that the doctrine of exhaustion is not applicable in this case." ... F. Supp. ....

Indeed, Commissioner of Education Howe had admitted in testimony before a congressional committee that his office has delayed administrative proceedings so as to keep the school districts from securing judicial review.[24]

While no court has passed on the validity of the Guidelines after a full trial on the merits of the issue (except the three-judge district court in Alabama which considered the issue foreclosed to it), it is interesting to note that a Hearing Examiner before whom the issue had been thoroughly developed during the course of H. E. W. administrative hearings found the Guidelines to be "unlaw-

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[24] Guidelines for School Desegregation, Hearings Before the Special Subcommittee on Civil Rights of the Committee on the Judiciary, House of Representatives, December 14, 15 and 16, 1966. U. S. Government Printing Office (1966), p. 42.

ful requirements" for determining whether the operations of school districts met legal standards.[25]

Moreover, committees of both the House and Senate have reported that the requirements of the Guidelines go beyond the law. In its report on H. E. W. appropriations the House Appropriations Subcommittee said:

> "This appropriation finances the enforcement of the Civil Rights Act with regard to the programs administered by the Department. Testimony before the committee indicated clearly that the Department has gone beyond the law in these enforcement activities and in requirements under the so-called guidelines. The committee cautions that the Department will be expected to administer the law with equal firmness and fairness among all the States." H. R. Rep. No. 271, 90th Cong., 1st Sess. 44 (1967).

The language of the report of the Senate Appropriations Committee was even stronger. It said:

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[25] **In the matter of Calhoun County School District No. 1, et al.,** H. E. W. Docket No. CR-206, CR-207, CR-231 and CR-232, Hearing Examiner Seymour Wenner published his decision on April 19, 1967, saying at page 46:

> "It is evident that the Guidelines are being used as substantive rules and are not 'a mere statement of the enforcement policies of the Commissioner of Education.' Requiring recipients to abide by the Guidelines would be proper if under section 80.4 (c) the Commissioner were authorized to decide cases on an ad hoc case-by-case basis, the only standard being his discretionary determination whether a particular plan is adequate to meet the purpose of the Act. But the Act requires that cases be decided on the basis whether proposals or conduct meet standards prescribed in rules approved by the President. The Commissioner is not authorized to require conformance to rules not approved by the President as the test of compliance. Although the Guidelines were never approved by the President, the Department is using them as if they were proper rules for effectuating the Act. Consequently, they are unlawful requirements."

The decision was reversed by the Commissioner of Education on August 17, 1967.

> "* * * that the revised education guidelines contravene and violate the legislative intent of Congress in the enactment of the Civil Rights Act of 1964." S. Rep. No. 1631. 89th Cong., 2d Sess. 71-73 (1966).

An effort to nullify this expression of legislative intent was defeated on the floor of the Senate. 112 Cong. Rec. 22955-22966, 23316-23321, 23341 (daily ed. Sept. 27, 28, 1966).

We do not argue that this Court should pass on the validity of the Guidelines now. The parties did not join issue and present proof on that question in the district court. We do urge, however, that the legal validity of the Guidelines is subject to sufficient doubt that this Court should not accept these administrative rules[26] as establishing any sort of "minimum standards"[27] for measuring whether school authorities are discharging their constitutional obligations.

D. **The Freedom of Choice Method of School Assignment Violates No Constitutional Rights.**

This Court's approval of free choice assignment procedures is implicit in its language in **Goss v. Board of Education**, 373 U. S. 683, 687:

> "In doing so, we note that if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial com-

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[26] Even the majority in **Jefferson County** recognized that these were nothing more than unilaterally drawn rules prepared under circumstances not calculated to avoid bias or to insure that constitutional and legal rights were protected. It said:

> "The Guidelines have the vices of all administrative policies established unilaterally without a hearing. * * * an agency construction of a statute cannot make the law; it must conform to the law and be reasonable." 372 F. 2d at 857.

[27] Petitioners' brief, p. 19.

position of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or to transfer to another."

And at pages 688-689:

"This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial considerations, would fall. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein."[28]

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[28] The Solicitor General now contends that another assignment procedure must be adopted in this district that will result in both schools being predominantly Negro, but he ignores the forces this would set in motion that would cause both schools to quickly convert to virtually all-Negro. His office was more realistic in its appraisal of practical problems in its brief amicus curiae filed in **Goss**. At page 20 it was noted:

"Given existing conditions, requiring a particular white child who had always lived a sheltered life in a rigidly segregated community suddenly to go to an overwhelmingly Negro school might create problems of adjustment interfering with the individual's educational development. Conversely, forcing a Negro child to break away from his established pattern and attend an all-white school might in some circumstances impair his development. **In our view, the constitutional obligation to desegregate the schools 'with all deliberate speed' does not require blindly forcing white children now to attend overwhelmingly Negro schools or Negro children now to attend overwhelmingly white schools** at the sacrifice of their individual welfare" (Emphasis supplied).

The Solicitor General then argued that a freedom of choice plan was a constitutional assignment procedure which had the particular merit of not requiring any child to attend a school predominantly attended by students of another race, saying at page 36:

"Even more important, there are practical alternatives—which are not based on racial criteria and which do not

The Court's continued approval of the free choice concept was strongly suggested in its remand of **Calhoun v. Latimer**, 377 U. S. 263.

The freedom of choice procedure does not impose a burden on the individuals affected as petitioners argue. Petitioners' brief, p. 30. To the contrary, in the constitutional sense, it preserves and affords full exercise of a right that this Court has held to be secured by both the Fifth and Fourteenth Amendments—the right of the parent to direct the upbringing and education of his children. This right is so indispensable to the maintenance of a free society that this Court has consistently preserved it against persuasive arguments grounded on the State's interest in the education of its children. In **Pierce v. Society of Sisters of Holy Names**, 268 U. S. 510, this Court unanimously struck down a compulsory education law adopted by the voters of Oregon which required all children between specified ages to attend the public schools. It agreed with the judgment of a three-judge district court that as a part of the liberty secured by the Fourteenth Amendment parents had the right to select the institutions and teachers to whom they would entrust the education of their children. This Court said:

> "* * * we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. * * * The fundamental theory of liberty upon which all gov-

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support segregation—for meeting any legitimate educational problems of the children affected. First, the school board might allow any child who so desired to transfer to any school which had available space. This would mean that no child would be required to attend a school overwhelmingly composed of students of another race. * * * And the practicability of this plan is demonstrated by its use in numerous big cities with large Negro populations, such as Louisville and Baltimore."

ernments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U. S. 534-5.

This Court has always rejected as inimical to our traditions every governmental effort to homogenize our children through usurpation of parents' natural rights. In **Meyer v. Nebraska**, 262 U. S. 390, it declared a statute restricting the teaching of foreign languages in the schools to be unconstitutional, saying:

> "The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. * * * Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; * * *."
>
> "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and entrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.
>
> "The desire of the legislature to foster a homogenous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate. * * * But the means adopted,

> we think, exceed the limitations upon the power of the state, and conflict with rights assured to plaintiff in error." 262 U. S. 400, 402.

Those fundamental liberties held to be secure from State interference by virtue of the Fourteenth Amendment in **Pierce** and **Meyer** were held to be also beyond the power of the federal government to impair in **Farrington v. Tokushige**, 273 U. S. 290, by virtue of the due process clause of the Fifth Amendment. Not even Congress can interfere with the right of parents to direct the education of their children. Indeed, Congress scrupulously avoided doing so in the Civil Rights Act of 1964.

A most perceptive analysis of the result, in terms of individual constitutional rights, of striking down state-imposed racial segregation was before the Court during its deliberations in **Brown**. In an *amicus curiae* brief filed on behalf of the Congress of Industrial Organizations, Arthur J. Goldberg (later Associate Justice of this Court) argued that state-mandated racial separation should be declared unconstitutional in order to secure to each individual the greatest freedom of choice, which included the right to choose racial separation. The position of the C. I. O. was stated at page 1:

> "This brief *amicus curiae* is submitted by the Congress of Industrial Organizations with the consent of the parties. The CIO is an organization dedicated to the maintenance and extension of our democratic rights and civil liberties and therefore has a deep interest in the elimination of segregation and discrimination from every phase of American life. * * *"

At page 8, *et seq.*, Mr. Goldberg expounds this position:

> "* * * The essence of the whole segregation controversy lies in the distinction between a provision of law **permitting** individuals to separate themselves ac-

cording to race and a provision **requiring** them so to separate. As we pointed out in the **Sweatt** and **McLaurin** cases, it is this important distinction which the Court itself ignored in **Plessy v. Ferguson.** A law permitting individuals to separate themselves according to race permits individuals to exercise their own freedom of choice, to respond in whatever way their prejudices or lack of prejudices may impel them. To require individuals so to separate permits no such choice. Prejudice is imposed by the constituted authority of the state without regard to the preferences of the individual. • • •

"The alternatives are not enforced segregation or enforced commingling. Nor is the question whether a law may constitutionally **permit** the separation of the races. The alternative to enforced segregation is freedom of choice and the question is whether a state may deny that freedom to individuals and require them, willy-nilly, to separate according to race.

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". . . These general concepts—that permissive separation is not the same as compulsory segregation and that the constitutional evil in all these cases is not the separation of the races but the denial to the individual of his right to choose to be separate or not—may, perhaps, be usefully applied in dealing with the particular kind of segregation problem here presented, viz.: public school education.

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". . . There is nothing which requires a state to compel attendance by each pupil at a specific school. In many communities it is customary to permit individual students, or their parents, to exercise a choice concerning the particular school which they will attend. That in fact, is the pattern in the Topeka case now before the Court (R. 245). The fact that the

state compels children to go to school, in other words, need not necessarily mean that it must deny to them a choice of schools. It is possible, in the words of the testimony in the **Briggs** case, that this matter can 'be settled on a voluntary basis.' The appellants do not here complain that the state should compel Negroes to attend white schools. They complain only that it forbids those Negrose who want to attend the white schools from doing so. It may very well be true that most Negroes, if given a choice, will continue to attend schools which are predominantly attended by Negroes and that very few would choose to attend the predominantly white schools. But this lends no support whatsoever to the action of the state in denying to the Negroes the opportunity so to choose.

"We do not mean, be it understood, that there is anything in the 14th Amendment which makes it mandatory that pupils be given a choice of school. We only mean that the elimination of compulsory segregation is not the same thing as compulsory attendance of whites at Negro schools, or Negroes at white schools, because the states can, wherever they now compel separation, offer separation on a voluntary basis. Even compulsory attendance at particular schools based on residential districting rests ultimately on the voluntary choice of residence. Negroes and whites would no more be compelled to attend the same schools under such regulations than were Negroes and whites compelled to live in the same neighborhood when compulsory residential segregation was declared invalid in **Buchanan v. Warley**, 245 U. S. 60."

By the alternative method of school assigment they propose in this case, petitioners would deny to the parents of both Negro and white students the right to select the school their children will attend. They assert that this right must be denied because, when given a choice, most

white children do not choose to attend a predominantly Negro school, and a sufficient number of Negro students choose to attend a school with members of their own race that there continues to be predominantly Negro, or all-Negro, schools. Petitioners' brief, pp. 28-32. The same argument was advanced in **Bradley v. Richmond,** 345 F.2d 310 (4th Cir., 1965), **rev'd on other grounds** 382 U. S. 103, where the court said:

> "* * * the plaintiffs insist that there are a sufficient number of Negro parents who wish their children to attend schools populated entirely, or predominantly, by Negroes to result in the continuance of some schools attended only by Negroes. To that extent, they say that, under any freedom of choice system, the state 'permits' segregation if it does not deprive Negro parents of a right of choice." 345 F. 2d 315-6.

The court's unimpeachable response to this argument was:

> "It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. Everyone of every race has a right to be free of discrimination by the state by reason of his race. There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous." 345 F. 2d 315.

The proposals of petitioners, even when viewed narrowly in terms of protecting the constitutional rights of Negroes only, must be tested in light of the obvious fact that the petitioners in each of these three cases are only nominal parties and that counsel for petitioners who prosecute these suits do not, and cannot, represent or

speak for all Negro citizens in this country. The patterns of voluntary racial association throughout the nation are indisputable proof that there are many Negroes, perhaps the vast majority, who do not want their right to choose to attend a school with members of their own race sacrificed. Certainly this record supports the conclusion that the majority of the Negro patrons of the Gould School District want that right preserved.

This argument that Negro and white parents alike do not know what is best for their children when they choose to send them to schools with members of their own race, and that this Court must therefore adopt a rule of constitutional law that denies them the opportunity to make such a choice, demonstrates its own absurdity. Individual constitutional liberties are not preserved by transferring decisions theretofore belonging to the individual to the school authorities, the courts, or any other governmental agency.

Petitioners do not attack the freedom of choice assignment method *per se*. They argue only that if the exercise of such choices does not result in something approximating the maximum possible intermingling of the races, the Constitution deprives the school authorities of the discretion to use this assignment method and requires that they select another method that may produce a greater racial mixture. This assertion rests on the unsound assumption that the Constitution commands maximizing the mixing of the races in the public schools, and that the constitutional rights of students are measured by percentages and mathematical formula.

That only about 13% of the Negro students in this school district chose in 1966-67 to attend the predominantly white school, and about 15% attend there during the current school year (Petitioners' brief, p. 4) proves nothing relevant to constitutional rights. It is a fact so indisputable as to be subject to judicial notice that the American peo-

ple, when left entirely to their own volition and resources, tend to congregate in a multitude of groups. Among the more prominent of these are economic, religious, nationality and racial groupings.

This was confirmed by the Commission on Civil Rights in its Report[29] at page 199:

> "1. Racial Isolation[30] in public schools is intense throughout the United States. In the Nation's metropolitan area, where two-thirds of both the Negro and white population now live, it is most severe. Seventy-five percent of the Negro elementary students in the Nation's cities are in schools with enrollments that are nearly all-Negro (90 per-cent or more Negro), while 83 percent of the White students are in nearly all-white schools. Nearly nine of every 10 Negro elementary students in the cities attend majority-Negro schools.
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> 2. This high level of racial separation in city schools exists whether the city is large or small, whether the proportion of Negro enrollment is large or small, and whether the city is located North or South."

Thus the proportion of Negro students in the Gould School District electing to attend school with members of their own race is not dissimilar to the proportion that has done so throughout the nation.[31] However, while the re-

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[29] Racial Isolation in the Public Schools, a Report of the United States Commission on Civil Rights, U. S. Government Printing Office (1967).

[30] This term is used by the Commission to describe racial separation without regard to whether it results from voluntary conduct of individuals, fortuitous circumstance, or discriminatory governmental action.

[31] In commenting on the relatively small numbers of Negro students who choose to attend predominantly white schools in northern cities when they are afforded such a choice, Robert

sult is about the same, the methods by which it is reached are not. In this school district to the extent separation of the races exists, it is purely the result of voluntary choice of the individuals concerned. The national result is the product of a complex of forces, but the most important factor underlying them is the natural tendency of racial groups to congregate.

No national law or policy is offended by the voluntary existence of racial groupings. The Court recognized the racial orientation of many private institutions, including schools, in **Evans v. Newton**, 382 U. S. 296, where it said at page 301-2:

> "Golf clubs, social centers, luncheon clubs, schools such as Tuskegee was at least in origin, and other like organizations in the private sector are often racially oriented."

There was no suggestion that this pattern was unlawful or of any governmental concern. Indeed, as Mr. Justice Douglas said in his concurring opinion in **Gibson v. Florida Legislative Investigation Committee**, 372 U. S. 539 at page 549, the people with whom a citizen chooses to associate "are no concern of government."

The Constitution does not prohibit the free choice of individuals and groups to select their associates; it secures their right to do so.

J. Havighurst in **The Public Schools of Chicago**, The Board of Education of the City of Chicago (1964), p. 375, estimates that an open transfer plan in Chicago would result in only 2 or 3 percent of the Negro children transferring to such schools and notes: "In New York where there has been a positive policy to promote permissive transfer, the result has not been striking. Only 6 percent of Negro pupils have transferred, even though their transportation was paid by the Board of Education." Experience in Fort Smith, Arkansas prompted the court to remark in **Rogers v. Paul**, 232 F. Supp. 833, 838 (D. C. W. D. Ark., 1964): "It seems clear that the great majority of pupils, white and Negro, do not desire to attend an integrated school."

E. Manipulations of School Assignments to Achieve Racial Balance Are Self-Defeating and Promote Increased Separation of the Races.

In each of these three cases petitioners offer an alternative assignment method to that selected by the school officials. In each instance the feature that they urge should require the adoption of their alternative is that it would produce a larger degree of racial mixing—a greater racial balance—in the schools. We have already demonstrated that racial balance in the public schools is not constitutionally mandated, and manipulation of assignments in effort to achieve it involve constitutionally prohibited racial classifications. However, we would be derelict if we did not touch upon the practical implications to public education in this country if the petitioners' position were accepted by the Court in these cases.

Experience has proven, even in those areas where dedication to the principles of **Brown** is the most widespread and enthusiastic, that when the proportion of Negro students in a school approaches 50% it tends to convert quickly to an all-Negro school. At page 199 of its Report, the United States Commission on Civil Rights said: "There is evidence to suggest that once a school becomes almost half—or majority—Negro, it tends rapidly to become nearly all-Negro." The obvious precipitating factor of this phenomenon is the withdrawal of white students whose parents change residence to qualify their children for another public school more to their choosing or enter them in private schools. Their motives range from a fear of deterioration in the educational program or an unwillingness to have their child in a school where the dominant culture is different from their own to plain racial hostility. The motives differ, but the same result is produced with unvaried consistency.

In Washington, D. C., where desegregation following **Brown** placed many white students in schools where they

were in a minority, the flight to the suburbs and private schools has left the city with virtually an all-Negro public school system.[32] The same pattern has developed in virtually all of the country's metropolitan areas with substantial Negro populations.[33]

In the southern and border states where there are hundreds of school districts with a majority or substantial minority of Negro students a general flight of white students between school districts, or to private schools, has not yet developed. This is because the freedom of choice assignment procedure adopted by the vast majority of southern school districts[34] has only infrequently

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[32] In **The New Republic**, July 22, 1967, p. 18, Joseph Alsop comments on the impossibility of achieving any sort of racial balance in the Washington schools:

> "In Washington, to begin with, serious school desegregation is such an obvious impossibility that it is plain silly to talk about it. Officially, any school that is more than half Negro is defined as segregated. But in the District of Columbia, the primary and elementary schools are 93 per cent Negro, and even the high schools are pushing up toward 90 percent. Therefore, total, forcible homogenization of the entire school system would still leave Washington with overwhelmingly segregated schools. Indeed, this kind of forcible homogenization would quite certainly result in even greater segregation; for the predictable consequence would be an increase in the Negro percentage in the primary and elementary schools from 93 percent to 98 or 99 percent."

[33] This caveat was contained in **Chicago Public Schools**, Report by the Advisory Panel on Integration of the Public Schools (1964), p. 12:

> "Finally, it cannot be too strongly stressed that programs to effect school integration must reckon with the fact that the white elementary school child is already in the minority in the public schools of Chicago and the time is not far off when the same will be true of the white high school student. Unless the exodus of white population from the public schools and from the City is brought to a halt or reversed, the question of school integration may become simply a theoretical matter, as it is already in the nation's capital. For integration, in fact, cannot be achieved without white students."

[34] Petitioners' brief, p. 28, fn. 16.

resulted in white students being confronted with mandatory assignment to a predominantly Negro school. However, in those instances where this has occurred the result was the same as experienced in the northern cities. For example, the Linwood School District of Jefferson County, Arkansas, is in a county adjacent to that in which the respondent school district is located. During 1966-67 each of its two schools offered grades 1 through 8, and assignment of students was on a freedom of choice basis. At the commencement of the 1967-68 school year grades one through four were consolidated at one school and the other four grades at the other. Official reports filed with H. E. W. reflect that while there were 62 white children enrolled with over 300 Negro students during 1966-67, the number of white children attending school in this district dropped to seven at the commencement of the 1967-68 school year. Review of that school district's records at the time this brief is being prepared reveals[35] that only two white students still attend school in this district.

H. E. W. has been compiling, but has not yet released, statistics that would reflect to what extent this pattern is developing in the southern States as a result of efforts to achieve racially balanced schools to comply with the

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[35] The hollow victories won by H. E. W. mandated efforts to achieve racially balanced schools demonstrate the validity of Judge Prettyman's views that the solution to problems of racial coexistence do not lie in forced association. In **Carr v. Corning**, 182 F. 2d 14, 16 (D. C. Cir., 1950), he said:

> "Since the beginning of human history, no circumstance has given rise to more difficult and delicate problems than has the coexistence of different races in the same area. Centuries of bitter experience in all parts of the world have proved that the problem is insoluble by force of any sort. The same history shows that it is soluble by the patient processes of community experience. Such problems lie naturally in the field of legislation, a method susceptible of experimentation, of development, of adjustment to the current necessities in a variety of community circumstance."

Guidelines. Judge Bell records one other such instance in his dissent in **Jefferson County:**

> "A good example of the problems to be encountered in eliminating the dual school system is to be seen in the Taliaferro County, Georgia, school system. See Turner v. Goolsby, S. D. Ga., 1965, 255 F. Supp. 724, for background. There were only two schools in the system and the board desegregated, effective in September 1966, on the basis of converting the white school into an elementary school and the Negro school into a high school. A perfect racial balance would be accomplished under the plan. In 1965 there were approximately 600 Negro children and 200 white children enrolled in the system. The records of the Georgia State Department of Education as of January 19, 1967, indicate that there are now 527 Negro students enrolled in the Taliaferro County School system and no white students." 380 F. 2d at 416, n. 6.

The procedure that resulted in an abandonment of the public schools by the white patrons in Taliaferro County is precisely the one that petitioners urge to be a "feasible alternative" in the Gould School District. If adopted, each of the two schools would be predominantly Negro if the white children continued to attend them. However, the tragic, but inevitable, fact is that virtually all, if not all, of the white children would be withdrawn from the schools of this district. There is no logic to support the supposition that although white parents in Chicago, Washington and New York will not consign their children to predominantly Negro schools, white parents in Gould, Arkansas would be willing to do so.

We stress that in most instances these parental decisions will not be manifestations of racial prejudice. Desegregation is an accomplished fact in this school district. Every white child in the district is attending an integrated school where Negro students exceed 20% of

the student body. These parents are willing to have their children attend school with Negroes, but they are not willing to expose their children to the consequences of being a minority in a school where the dominant culture is so different from their own. The decisions will be made in terms of each parent's analysis of what is best for his child, and his fervent desire to obtain it.

Consistent with the pattern that has developed over the nation, many white children would be sent to public schools in other districts[36]—in a move that could involve a change of family residence or sending the child to live with relatives or friends for the school year. Others would enter private schools.

All—Negro and white alike—would suffer immeasurable harm. The white students would lose the benefits of public education provided in and by their local community. The complete withdrawal of support of the local schools by the white community would leave the educational system defaulted to the Negroes in circumstances hardly calculated to meet even the most basic educational needs of its students. Although **Griffin v. School Bd. of Prince Edward County**, 377 U. S. 218, would probably result in the maintenance of an educational system of sorts, the white property owners who pay a disproportionate share of the local school taxes could not be expected to continue supporting taxes on their property at annual school elections when their children no longer shared in the benefits of the public school system.[37]

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[36] The racial distribution in Arkansas is fairly typical of that of other states with substantial bi-racial population. There are 171 all-white, 6 all-Negro and 218 bi-racial school districts. Report of Arkansas State Education Commissioner A. W. Ford released October 11, 1967. See Arkansas Gazette, October 12, 1967, p. 4A.

[37] A substantial portion of the operating revenues of the public schools in Arkansas is derived from ad valorem taxes, and the tax rate is annually submitted to the electorate in each district.

Counsel for petitioners whose principal—though misdirected—attack is on the elimination of the all-Negro school would have difficulty demonstrating the fruits of victory to their clients (and the others they purport to represent) when they delivered to them the keys of a school system abandoned by the white citizens.[38]

Translated into national consequences, if this Court should decree that racial balance is the constitutionally mandated pole star that must direct assignment procedures in all school districts, the future of public education in this nation would be in serious jeopardy. This would be the result of placing the imprimatur of the Constitution on the educational theories and sociological experiments that underlie petitioner's position in this Court.

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[38] The impact of withdrawal of white students from the public schools to avoid attendance in predominantly Negro schools is described in an article entitled "New 'Private' Schools Drain Public System" in **The Washington Post**, March 3, 1968, p. B3.

> "The impact of the private schools on public school systems in the South is much broader than simple enrollment figures would indicate. The existence of one private school for middle and upper-income whites in a county or town can cause a slump in support for the public schools throughout the community.
>
> "When student enrollment decreases in a school system, per pupil costs rise. In a rural area, even a small drop in enrollment may reduce the amount of state aid for which a school district is eligible while it increases the cost of educating each child.
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> • • • • • • • •
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> "Surry and Prince Edward Counties in Southside Virginia are extreme examples of what a private school system for whites can do to the public schools. In both counties, virtually all of the students in the public schools are Negro and all of the private school students are white."

Official reports in H. E. W. files reflect that on September 30, 1967 there were 11 white students and 1,612 Negro students in the public schools of Prince Edward County. In private schools were 1,190 white students.

CONCLUSION.

Respondents accept without reservation their obligation to comply with the Constitution as construed in **Brown**, and to exclude no child from any school because of his race as mandated by the Civil Rights Act of 1964. They have challenged customs and traditions that had existed for well over a century by voluntarily making the transition in this school district from a racial to a non-racial assignment procedure. They have succeeded in bringing about this difficult adjustment without destroying the school system. It is respectfully submitted that the Constitution does not require that they now abandon an assignment procedure that assures every child admission to the school of his choice in favor of one that would greatly damage, if not destroy, the public schools of this community.

Respondents respectfully submit that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 805.—October Term, 1967.

Arthur Lee Raney et al., Petitioners, *v.* The Board of Education of The Gould School District et al.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[May 27, 1968.]

Mr. Justice Brennan delivered the opinion of the Court.

This case presents the question of the adequacy of a "freedom-of-choice" plan as compliance with *Brown* v. *Board of Education*, 349 U. S. 294 (*Brown II*), a question also considered today in No. 695, *Green* v. *County School Board of New Kent County*, *ante*, p. —. The factual setting is very similar to that in *Green*.

This action was brought in September 1965 in the District Court for the Eastern District of Arkansas. Injunctive relief was sought against the continued maintenance by respondent Board of Education of an alleged racially segregated school system. The school district has an area of 80 square miles and a population of some 3,000, of whom 1,800 are Negroes and 1,200 are whites. Persons of both races reside throughout the county; there is no residential segregation. The school system consists of two combination elementary and high schools located about 10 blocks apart in Gould, the district's only major town. One combination, the Gould Schools, is almost all white and the other, the Field Schools, is all Negro. In the 1964–1965 school year the schools were totally segregated; 580 Negro children attended the Field Schools and 300 white children attended the Gould Schools. Faculties and staff were and are segregated. There are

no attendance zones, each school complex providing any necessary bus transportation for its respective pupils.

The state-imposed segregated system existed at the time of the decisions in *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294. Thereafter racial separation was required by School Board policy. As in *Green*, respondent first took steps in 1965 to abandon that policy to remain eligible for federal financial aid. The Board adopted a "freedom-of-choice" plan embodying the essentials of the plan considered in *Green*. It was made immediately applicable to all grades. Pupils are required to choose annually between the Gould Schools and the Field Schools and those not exercising a choice are assigned to the school previously attended.

The experience after three years of operation with "freedom of choice" has mirrored that in *Green*. Not a single white child has sought to enroll in the all-Negro Field Schools, and although some 80 to 85 Negro children were enrolled in the Gould Schools in 1967, over 85% of the Negro children in the system still attend the all-Negro Field Schools.

This litigation resulted from a problem that arose in the operation of the plan in its first year. The number of children applying for enrollment in the fifth, tenth, and eleventh grades at Gould exceeded the number of places available and applications of 28 Negroes for those grades were refused. This action was thereupon filed on behalf of 16 of these children and others similarly situated. Their complaint sought injunctive relief, among other things, against their being required to attend the Field Schools, against the provision by respondent of public school facilities for Negro pupils inferior to those provided for white pupils, and against respondent's "otherwise operating a racially segregated school system. While the case was pending in the District Court, respondent made plans to replace the high school building at Field

Schools. Petitioners sought unsuccessfully to enjoin construction at that site, contending that the new high school should be built at the Gould site to avoid perpetuation of the segregated system. Thereafter the District Court, in an unreported opinion, denied all relief and dismissed the complaint. In the District Court's view the fact that respondent had adopted "freedom of choice" without the compulsion of a court order, that the plan was approved by the Department of Health, Education, and Welfare, and that some Negro pupils had enrolled in the Gould Schools "seems to indicate that this plan is more than a pretense or sham to meet the minimum requirements of the law." In light of this conclusion the District Court held that petitioners were not entitled to the other relief requested, including an injunction against building the new high school at the Field site. The Court of Appeals for the Eighth Circuit affirmed the dismissal. 381 F. 2d 252. We granted certiorari, 389 U. S. 1034, and set the case for argument following No. 740, *Monroe* v. *Board of Commissioners of the City of Jackson, post,* p. —.

The Court of Appeals suggested that "no issue on the adequacy of the plan adopted by the Board or its implementation was raised in the District Court. Issues not fairly raised in the District Court cannot ordinarily be considered upon appeal." 381 F. 2d, at 257. Insofar as this refers to the "freedom-of-choice" plan the suggestion is refuted by the record. Not only was the issue embraced by the prayer in petitioners' complaint for an injunction against respondent "otherwise operating a racially segregated school system" but the adequacy of the plan was tried and argued by the parties and decided by the District Court. Moreover, the Court of Appeals went on to consider the merits, holding, in agreement with the District Court, that ". . . we find no substantial evidence to support a finding that the Board was not

proceeding to carry out the plan in good faith." *Ibid.*[1] In the circumstances the question of the adequacy of "freedom of choice" is properly before us. On the merits, our decision in *Green* v. *County School Board, supra,* establishes that the plan is inadequate to convert to a unitary, nonracial school system. As in *Green,* "the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Id.,* at pp. 11–12.

The petitioners did not press in the Court of Appeals their appeal from the denial of their prayer to have the new high school facilities constructed at the Gould Schools site rather than at the Field Schools site. Due to the illness of the court reporter there was delay in the filing of the transcript of the proceedings in the District Court and meanwhile the construction at the Field Schools site was substantially completed. Petitioners therefore modified their position and urged in the Court of Appeals that respondent be required to convert the Gould Schools to a completely desegregated high school and the Field site to a completely desegregated primary school. The Court of Appeals rejected the proposition on the ground that it "was not presented to the trial court and no opportunity was afforded the parties to offer evidence on the feasibility of such a plan, nor

[1] Compare the developing views of the feasibility of "freedom-of-choice" plans expressed by various panels of the Court of Appeals for the Eighth Circuit in *Kemp* v. *Beasley,* 352 F. 2d 14; *Clark* v. *Board of Education,* 374 F. 2d 569; *Kelly* v. *Altheimer,* 378 F. 2d 483; *Kemp* v. *Beasley,* 389 F. 2d 178; and *Jackson* v. *Marvell School District No. 22,* 389 F. 2d 740.

was the trial court given any opportunity to pass thereon." 381 F. 2d, at 254. Since there must be a remand, petitioners are not foreclosed from making their proposal an issue in the further proceedings.[2]

Finally, we hold that in the circumstances of this case, the District Court's dismissal of the complaint was an improper exercise of discretion. Dismissal will ordinarily be inconsistent with the responsibility imposed on the district courts by *Brown II*. 349 U. S., at 299–301. In light of the complexities inhering in the disestablishment of state-established segregated school systems, *Brown II* contemplated that the better course would be to retain jurisdiction until it is clear that disestablishment has been achieved. We agree with the observation of another panel of judges of the Court of Appeals for the Eighth Circuit in another case that the district courts "should retain jurisdiction in school segregation cases to insure (1) that a constitutionally acceptable plan is adopted, and (2) that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, non-racially operated school system is rapidly and finally achieved." *Kelley* v. *Altheimer*, 378 F. 2d 483, 489. See also *Kemp* v. *Beasley*, 389 F. 2d 178.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion and with our opinion in *Green* v. *County School Board, supra*.

It is so ordered.

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[2] The Court of Appeals, while denying petitioners' request for relief on appeal, did observe that

"there is no showing that the Field facilities with the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school when the appropriate time for such course arrives. We note that the building now occupied by the predominantly white Gould grade school had originally been built to house the Gould High School." 381 F. 2d, at 255.